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ENFORCEMENT OF LEGISLATIVE ETHICS: CONFLICT WITHIN THE CONFLICT OF INTEREST LAWS

ROBERT M. RHODES*

Introduction

The existence of official conflicts of interest is a problem that has plagued government throughout the history of the United States.[1] It is an affliction that saps the health of political institutions and blemishes the popular image of government officials. Recent commentators, however, have reflected a growing refusal on the part of the populace to condone overt cases of unethical conduct by officials vested with the public trust. Manning reports that public concern with political morals has reached a level of "obsession" evidenced by an escalation of moralism in American politics.[2] Moreover, President John Kennedy implored Congress to recognize that "[n]o responsibility is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business."[3]

Rather than reanalyzing the significance of legislative conflicts of interest to our moral and political ethic,[4] this article focuses on

*Candidate for M.P.A. degree, John F. Kennedy School of Government, Harvard University. A.B., 1964, J.D., 1968, University of California, Berkeley. Executive Assistant to the Speaker of the Florida House of Representatives, 1970-72.

1 *See* R. HOFSTADTER, THE UNITED STATES: THE HISTORY OF A REPUBLIC 424-25, 630-31, 638 (1958); S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 729-30, 932-33, 1082 (1965); A. NEVINS & H. COMMAGER, A SHORT HISTORY OF THE UNITED STATES 615 (1966).

2 Manning, *The Purity Potlach: An Essay on Conflict of Interest, American Government and Moral Escalation*, 24 FED. B.J. 239, 246 (1964). *See also* R. GETZ, CONGRESSIONAL ETHICS (1966).

3 J. F. KENNEDY, ETHICS IN GOVERNMENT, H.R. DOC. No. 145, 87th Cong., 1st Sess. (1961).

4 Substantial work has already furrowed this ground. Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 RUTGERS L. REV. 666 (1959); Note, *State Legislative Conflicts of Interest: An Analysis of the Alabama Ethics Commission Recommendations*, 23 ALA. L. REV. 369 (1971) [hereinafter cited as Alabama Note]; Note, *State Conflict of Interest Laws: A Panacea for Better Government?*, 16 DE PAUL L. REV. 453 (1967) [hereinafter cited as De Paul Note]; Note, *Conflicts of Interest of State Legislators*, 76 HARV. L. REV. 1209 (1963) [hereinafter cited as Harvard Note].

a relatively ignored, yet vital, problem area within the general confines of legislative conflict of interest — the enforcement of sanctions, whether authorized by statute, code, or legislative rule. Intensive consideration is devoted to this issue for the obvious, yet often ignored, reason that a brilliantly drafted law yields little social benefit if it is unenforced. After outlining the enforcement problem within the legislative system, this article describes and analyzes the various approaches to enforcement that have been developed within Congress and state legislative bodies. An effort is also made to relate relevant social science research to policy choices and delineation of issues involved in developing an adequate enforcement procedure. A suggested model approach to the problem, incorporating legislative drafting guidelines, is then presented and explained.

I. Defining the Problem

At the outset, one should recognize that for many reasons the traditional reliance on the electorate to "clean house" and vote out unethical law-makers has failed both in Congress and in a large majority of states. First, it is evident that many state legislative races are not fought on the issues, but merely along party lines.[5] Also, a large number of incumbents traditionally run unopposed in safe districts. Second, conflict of interest is a complex and subtle issue which is easily misunderstood[6] or disregarded in political campaigns. In a campaign, where slogans and imagery dominate, charges of unethical conduct are only one small portion of the information constantly bombarding the public. Third, given the "purity potlach" so ably described by Manning,[7] raising the issue of unethical behavior in a campaign stimulates response in kind from opponents. Hence, many candidates may be hesitant even to bring the charge before the public during the campaign. Fourth, the ultimate success of a candidate against whom conflict of interest charges are brought and established may be inter-

5 Harvard Note, *supra* note 4, at 1213.

6 *Id.*

7 Manning uses this term to discredit a perceived moral escalation in national politics. Manning, *supra* note 2, at 246.

preted by law-makers as public approval of unethical action.[8] Finally, sporadic and inconsistent policing by the electorate fails to provide a rational set of identifiable standards by which legislators can measure projected action before the fact.[9]

Against a background of public concern, a growing number of state legislatures have enacted comprehensive conflict of interest legislation,[10] while other bodies are presently considering the problem.[11] Moreover, several professional journals and associations have recently lent support to the reform movement, and a number of model codes have been drafted[12] or are in the process of being developed.[13]

With this perspective in mind, it is appropriate to begin this analysis by defining key terms. Commentators have struggled and split over an adequate definition of "conflict of interest." Offerings span the spectrum of the relatively simple[14] to the complex and somewhat opaque.[15] Other analyses[16] and some statutes[17] refrain

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8 Harvard Note, *supra* note 4, at 1213-14.

9 *Id.* at 1214.

10 Some of the more recent enactments of comprehensive conflicts of interest legislation include: CAL. GOV'T CODE §§ 8920-55 (West Supp. 1972); CONN. GEN. STAT. ANN. §§ 1-66 to -78 (Supp. 1973); FLA. STAT. ANN. §§ 112.311-.318 (Supp. 1973); ILL. REV. STAT. ch. 127, §§ 601-07 (1971); KAN. STAT. ANN. 75-4303 (Supp. 1971); LA. REV. STAT. ANN. §§ 42:1101-48 (1965); MASS. GEN. LAWS ANN. ch. 268A (1970); N.J. STAT. ANN. 52:13D (Supp. 1972-73); N.Y. PUB. OFFICERS LAW § 74 (McKinney Supp. 1971-72); TEX. REV. CIV. STAT. ANN. art. 6252-9 (Supp. 1972-73); WASH. REV. CODE ANN. §§ 42.18-.23 (1972), § 44.60 (1970).

Other statutes of somewhat longer standing are HAWAII REV. STAT. §§ 84-21 to -32, -34 to -36 (1968); ME. REV. STAT. ANN. tit. 3, § 381 (1971); and NEB. REV. STAT. 49-1105, 1110-16 (Supp. 1969).

11 Some 32 states reported legislative activity in the conflicts area during 1969 and 1970, and at least 20 states reported consideration in the 1971 sessions. COMMITTEE ON LEGISLATIVE RULES, NATIONAL LEGISLATIVE CONFERENCE, CONFLICT OF INTEREST AND RELATED REGULATIONS FOR STATE LEGISLATURES 1 (1971).

12 *A Conflict of Interest Act*, 1 HARV. J. LEGIS. 68 (1964); *Conflicts of Interests: A New Approach*, 18 U. FLA. L. REV. 675 (1966).

13 The National Municipal League is presently drafting a model governmental ethics code. NATIONAL MUNICIPAL LEAGUE, PRELIMINARY BIBLIOGRAPHY ON CONFLICT OF INTEREST AND PERSONAL ETHICS IN GOVERNMENT (1970).

14 "The term . . . denotes a situation in which an official's conduct of his office conflicts with his private economic affairs." GEIZ, *supra* note 2, at 3 (footnote omitted).

15 "A conflict of interests . . . exists whenever a legislator or other public official has placed himself in a position where, for some advantage gained or to be gained for himself, he finds it difficult if not impossible to devote himself with complete energy, loyalty, and singleness of purpose to the general public interest. The advantage that he seeks is something over and above the salary, the experience, the chance to serve the people, and the public esteem that he gains from public

from general definition in preferring to consider ethical problems as they arise in particular situations. Any definition of conflict of interest should be clear and easily comprehensible to the public and should provide broad guidelines for determining whether a conflict exists in particular situations. For purposes of this article, it is understood that conflict of interest situations will arise when an officer's official conduct conflicts or appears to conflict with his private, economic affairs. This description recognizes the significance of the legislator's role as community moral leader and the fact that the mere appearance of a conflict tends to undermine public confidence in the legislator personally and the legislature generally. Regulation of potential, as well as actual, conflict of interest situations should help eliminate the subtle temptation which might entice an official to further personal interests at the expense of cognizable public interests, fiscal or otherwise.[18] Hence, to attain maximum effect, conflict legislation should "stop public officials at the doorstep of temptation"[19] and promote both the actual practice and public appearance of impartiality and objectivity.[20]

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office." MINNESOTA GOVERNOR'S COMMISSION ON ETHICS IN GOVERNMENT, ETHICS IN GOVERNMENT 17 (1959).

16 ALABAMA ETHICS COMMISSION, REPORT OF THE ALABAMA ETHICS COMMISSION B-2 (1970).

17 *See, e.g.*, FLA. STAT. ANN. §§ 112.311, .313-14, .316 (Supp. 1973), which avoid any general definition of conflicts of interest in their declaration of legislative policy and, instead, identify conflicts in a variety of particular circumstances.

18 SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND THE FEDERAL SERVICE 3-4 (1960). *See also* Harvard Note, *supra* note 4.

19 Krasnow & Lankford, *Congressional Conflicts of Interest: Who Watches the Watchers?*, 24 FED. B.J. 264 (1964).

20 Regarding governmental regulation of improper practices, a Senate subcommittee chaired by Senator Paul Douglas offered the following description of improper practices:

> These practices tend frequently to be contrary to the public interest; they tend to make public officials consciously or unconsciously partial in handling issues which come before them; they create a suspicion of bias even where it may not exist; they tempt public officials to put personal interests ahead of or in conflict with public interests; or they are damaging or unfair to members of the public.

SENATE COMM. ON LABOR AND PUBLIC WELFARE, 8 2D CONG., 1ST SESS., REPORT ON ETHICAL STANDARDS IN GOVERNMENT 40-41 (Comm. Print 1951) [hereinafter cited as DOUGLAS REPORT].

A number of commentators also have described the double standard of morality existing between the private and public sectors. Although gifts, entertainment, and what is generally labelled "influence peddling" are all business practices, such practices raise public outrage when revealed in the public sector. *See, e.g.*, DOUGLAS REPORT, *supra* at 11-12; Eisenberg, *supra* note 4.

But one must first analyze the legislative system, not the election system, in order to devise an enforcement procedure that will function effectively.

II. The Legislative System

Systems analysis provides a useful theoretical framework by which to analyze behavior within the legislative system. Society may be viewed as an umbrella social system, composed of several major systems which are in turn broken down into smaller component sub-systems. One of these major systems is the political system, which functions to allocate resources and to make authoritative decisions on social goals. As a major sub-system of the larger political system, the legislature manages conflict in society and thereby provides cohesion and support for the political system. What is important in this model is that within each system individuals interact in order to achieve desired objectives. Hence, action within any system is functionally motivated and goal oriented. To attain system rewards, individuals act according to norms, or prescriptive standards, which are adhered to and accepted by system members. Behavioral departure from norms is generally met with some punishment or sanction, both formal and informal.

Communication of norms within the legislative system is accomplished through statutory enactment or legislative rule, as well as by informal methods understood as "rules of the game." Functionally, norms provide legislators with a working consensus on how to succeed in the system and act as cues to guide new members. They support control and consensus-building functions of the legislative system, advance group solidarity and cohesion, promote predictability within the system, and expedite legislative business. Roles are directly related to social norms and consist of the rights, duties, and obligations expected of the occupants of particular positions within the system.

Thus, the legislature is a system which absorbs a broad variety of demands as inputs and produces products in the form of policy decisions. Within a legislature exists a broad variety of formal and informal norms and prescriptive standards as to what legislators ought to do in order to achieve the rewards of legislative services. These rewards include effectiveness in passing legislation, power,

and prestige. Norms not only provide the consensual cement for rational proceedings within the chamber, but they also provide the acceptable parameters within which the law-maker must function if he is to fulfill his role as representative effectively. With this system-oriented perspective in mind, it then becomes appropriate to ask, whether given the normative pressures existing in every legislature, it is reasonable to expect such bodies to police themselves and to enforce legislative ethical standards.

Perhaps the first critical skepticism of the legislature's inability to keep its own house in order was raised by Wilson[21] and Graham[22] in the early '50's. Both authors reached similar conclusions that because of the "club spirit" which characterized relations among individual congressmen, Congress was incapable of policing itself. "Clubiness" as a deterrent to action was reenforced by a strong esprit de corps and a consequent defensive reaction whenever charges were brought against one of the members. Hence, the authors concluded that Congress had rejected its constitutional prerogative and responsibility to judge the actions of its own members.[23] Similar criticisms are equally applicable to state legislatures.[24] Given this conclusion, the next step is to isolate the specific factors within the legislative system that discourage enforcement of ethics standards. Here, the two major factors appear to be the pressure of informal norms and the fear of partisanship poisoning an objective result.

Informal norms provide the unwritten rules of the legislative game. As such, they are particularly effective in providing approved standards of interpersonal behavior among members as well as role expectations regarding legislative work. One commentator, in a study of congressional characteristics, observed that "informal norms . . . help to protect the members and preserve stability. In a body in which members are in contact with each other over long periods of time . . . informal ways of doing things grow up which help to avoid serious threats to the stability and functioning of the

21 H. WILSON, CONGRESS: CORRUPTION AND COMPROMISE (1951).

22 G. GRAHAM, MORALITY IN AMERICAN POLITICS (1952).

23 *Id.* at 82-96; WILSON, *supra* note 21, at 1-12.

24 For a compilation of state constitutional provisions relating to the legislature's power to seat and remove members, see LEGISLATIVE RESEARCH DRAFTING FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 662 (1959).

organization."[25] These potent informal behavioral patterns or "folkways" have been described by Matthews in his study of the United States Senate.[26] Of the six "folkways" isolated by Matthews, three are relevant to the consideration of legislative enforcement of ethics standards: courtesy, reciprocity, and institutional patriotism.[27]

Courtesy is one of the key unwritten rules of the game and requires that each senator deal with his colleagues in a courteous, almost deferential manner. Political disagreement, it is felt, should not influence personal feelings. Senators address each other as "the distinguished Senator from . . . ;" few opportunities to praise a colleague are missed; and birthdays, anniversaries, and retirements receive inordinate attention. Even the most vitriolic remarks are ostensibly addressed to the chair and not to a colleague. The extreme effect of the "courtesy" mandate is reflected in the seniority system which bestows committee chairmanships upon the most senior legislators who, consistent with the normative expectation, are the most deserving of deference. Courtesy recognizes the political reality that today's foe may indeed be tomorrow's ally on a different battlefield. Courtesy as an informal norm permits competitors to cooperate in a highly competitive environment and discourages the devisiveness of extreme partisanship.[28]

A further unwritten standard is reciprocity, or mutual assistance among colleagues. This normative expectation takes various forms including logrolling, trade-offs, constituent assistance, and voluntary absences on particular votes. Reciprocity requires a sensitivity to another law-maker's problems and a willingness to help if one can. In this manner, interpersonal unions are developed along

25 Froman, *Organization Theory and the Explanation of Important Characteristics of Congress*, 62 AM. POL. SCI. REV. 518, 523 (1968).

26 D. MATTHEWS, U.S. SENATORS AND THEIR WORLD (1960).

27 Matthews' additional folkways are: apprenticeship; legislative work; and specialization. Apprenticeship refers to the system whereby new members are subordinated to low status within the Senate through committee assignments, allocation of office space, and seating; newer members are expected to keep quiet and show deference to older statesmen. Legislative work is the norm against those who preoccupy themselves with publicity ("show horses"); rather, members are expected to shoulder their fair share of the legislative burden. Specialization means that members are expected not to try to master the voluminous array of issues facing the Senate, but are encouraged to specialize in a particular area in order to develop expertise. *Id.* at 92-97.

28 *Id.* at 97-99.

lines of common perspective, which, of course, have impact on personal, as well as political, action. Moreover, reciprocity breeds a cooperative spirit which facilitates the orderly transaction of house business.[29] Matthews found this norm to be so institutionalized that "it is not an exaggeration to say that reciprocity is a way of life in the Senate."[30]

Finally, one of the most significant group expectations demanded of the legislator is fidelity to the legislative body — institutional patriotism. Legislators are identified immediately with their institution, and sentiments and images surrounding that body therefore reflect positively or negatively on the member himself and provide norms for a good portion of a member's role expectation. Hence, it is not surprising that houses demand a certain emotional investment from the legislator. He is expected to believe in and reenforce among his fellows the feeling of belonging to the "best" legislative body in the nation. This institutional chauvinism spurs distrust of the executive branch and disdain for the other house. Such patriotism cannot be compromised and any nonconforming action will be met with suspicion. Moreover, anyone who brings his legislative body into public disrepute "invites his own destruction as an effective legislator."[31] Institutional patriotism, then, provides individual member identification with what they view as the finest group of people ever. And if the group is the finest, the most dedicated, must it not also be the purest? Institutional patriotism, therefore, not only provides positive integration and maintenance for the legislature, but is also raises serious impediments to intramural enforcement of ethical standards.

There is little doubt of the highly functional character of folkways as integrating forces within the Senate, as studied by Matthews,[32] or that they generalize to most legislative systems. Nor

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29 It is important to note the deliberative nature of procedural rules used by most legislatures. Without a waiver of some of these rules, legislative action would indeed progress at "glacial speed." Some houses require unanimous consent of the membership to waive the rules, others ¾ or ⅔ vote. Hence, it is not difficult for a small group or an individual, utilizing the rules, to paralyze a legislative body. *See id.* at 100-01.

30 *Id.* at 100.

31 *Id.* at 102.

32 "These folkways . . . are highly functional to the Senate social system since

can it be disputed that these informal norms influence the distribution of power within the system. As a representative, a legislator must accept the reality that without the respect of his colleagues, which is earned by virtue of fulfilling a defined role in the system, he will have little influence within the chamber. As one congressman put it, "If you don't get along with your committee and have their support, you don't get anything accomplished around here."[33] Support and respect of one's colleagues is obtained by conforming to the folkways of the institution. Those who do not conform run a serious risk of being rendered ineffective in a competition where production is the key to survival.[34] Hence, to get along, one must go along.

Yet, these functional norms have a dysfunctional aspect also. The very perspective and role behavior such norms instill in members render these same members virtually incapable of taking their wayward colleagues to task in a public forum. How can such distinguished colleagues cast aspersions on one of the brethern? How can a man who has cast the deciding vote the previous day in favor of a colleague's bill be expected to call attention to the sponsor's unethical conduct the next day? How can the "greatest and most public-spirited legislative body in the nation" have within its bosom a member who has egregiously violated his oath and responsibility to protect and preserve the public interest? The answers to these questions reveal inconsistencies which may be called the "conflict within the conflict of interest laws"[35] — the incapacity as well as the unwillingness of legislators to enforce their own codes of ethical behavior. Conformance to group-sanc-

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they provide motivation for the performance of vital duties and essential modes of behavior which, otherwise, would go unrewarded. They discourage frequent and lengthy speech-making . . . encourage the development of expertness and a division of labor in a group of overworked laymen facing unbelievably complex problems, soften the inevitable personal conflicts of a problem solving body, and encourage bargaining and the cautious use of awesome formal powers. Without these folkways, the Senate could hardly operate with its present organization and rules." *Id.* at 116.

33 Fenno, *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. 310, 321 (1962).

34 Equating "effectiveness" with passing legislation, Matthews found that conforming legislators were more effective. Conformance was measured by specialization and floor brevity. MATTHEWS, *supra* note 26, at 114-15.

35 The term has been used before, but not with the precise meaning intended here. Philos, *The Conflict in Conflicts of Interest: The Role of Law — The Role of Ethics*, 27 FED. B.J. 7 (1967).

tioned standards which encourage civility, mutual assistance, cohesion, and institutional chauvinism simply render the legislative institution unable to police itself.

Such a conclusion is buttressed by studies revealing congressional reluctance to use its disciplinary powers against its members.[36] Moreover, when disciplinary action is taken, it is not stimulated by illegal or unethical conduct; rather, it reflects legislative disfavor over a breach of one of the sacred folkways, such as institutional disloyalty or discourtesy.[37] Getz reports that the twentieth century has seen the formal censure of only five members of Congress. In each case, the offenses were considered insulting to the respective houses.[38] Similarly, after a subcommittee of the Senate Rules Committee analyzed the nature of Senate censure and expulsion proceedings from 1789 to 1960,[39] Senator Clifford Case complained that:

> Through the years, Congress has shown it cannot, will not, police itself. . . . Of the more than 250 cases summarized . . . by far the greater number involved a challenge of credentials or charges of election irregulatities. Only a handful involved the conduct of the office of Senator, and in the last century the Senate acted to condemn or censure in only two of these cases.[40]

Similar, though less analyzed, situations exist at the state level. For example, of the 22 opinions issued by the House Committee on Administration and Conduct of the Florida House of Representatives during the period 1967-1972, only two deal directly with cases of conflict of interest and legislator misconduct. Neither of these opinions led to formal legislative action against the member or even formal censure.[41]

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36 *See* GETZ, *supra* note 2, at 84-113; GRAHAM, *supra* note 22, at 82-96; WILSON, *supra* note 21.

37 GETZ, *supra* note 2, at 113.

38 *Id.* For instance, the House of Representatives disciplined Adam Clayton Powell for "institutional disloyalty" which brought discredit to himself and to the House in the opinion of Getz. *Id.* at 112. Senator Joe McCarthy was censured by the Senate on the basis of abuse of fellow senators. *Id.* at 99-100.

39 SUBCOMM. ON PRIVILEGES AND ELECTIONS, SENATE COMM. ON RULES AND ADMINISTRATION, SENATE ELECTION, EXPULSION, AND CENSURE CASES FROM 1789 to 1960, S. DOC. No. 71, 87th Cong., 2d Sess. (1962).

40 Case, *The Congress and Its Double Standard*, 24 FED. B.J. 257, 262, 263 n.14 (1964).

41 FLORIDA HOUSE OF REPRESENTATIVES, OPINIONS ON STANDARDS AND CONDUCT (1972).

Thus, historical precedent, stringent normative behavior supporting institutional cohesion, and the threat of partisan politics entering into and poisoning a disciplinary proceeding[42] all indicate that the legislature is not the forum before which legislators should be disciplined. Alternative procedures are required if legislative codes of ethics and appropriate statutes are to be enforced. The development of such procedures is the topic of the remaining portion of this article.

III. Efforts to Solve the Enforcement Problem

The need for guidelines in the murky area of conflict of interest is eloquently put by former Senator Paul Douglas:

> [M]any men, perhaps even the majority of those who go wrong, blunder into evil through ignorance. Not knowing clearly what is properly expected of them in concrete situations, they allow themselves to be led into compromising acts which gradually wash away a large part of their original idealism. . . .
>
> . . . Guiding principles and codes backed up by certain social sanctions can be of great aid to the troubled navigators on the stormy seas of life.[43]

States have attempted to provide ethical standards to "troubled legislative navigators" primarily in two ways: enforcement of standards through criminal sanctions and promulgation or enactment of legislative codes of ethics.

A. *Criminal Sanctions*

Early efforts by states to provide enforceable standards concentrated on legislation which defined conflict of interest in criminal terms. Such state legislation usually codifies the common law crimes of larceny and bribery[44] and provides a comparatively broad spectrum of penalties ranging from simple misdemeanors[45]

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42 Getz, *supra* note 2, at 113. Getz reports that threat of partisanship culminating in a misuse of disciplinary power is very real and supported by precedent revealing partisan trends in such cases as Joseph McCarthy, Theodore Bilbo, and Bobby Baker. *Id.* at 100, 101, 138.

43 P. Douglas, Ethics in Government 101-02 (1952).

44 *See, e.g.*, Fla. Stat. Ann. § 838.013 (1965), which provides criminal penalties for legislators convicted of bribery.

45 Ark. Stat. Ann. § 12-3008 (Supp. 1971).

to 10 years imprisonment or a $10,000 fine, or both.[46] Other states require forfeiture of office upon conviction.[47] Where activity is reasonably definable in objective terms, as bribery is, criminal statutes are quite appropriate. However, the great majority of conflict situations are far too hazy and subtle and therefore defy objective definition. Consequently, "existing criminal statutes dealing with conflict situations either are applicable to clearly repugnant behavior or are phrased so generally as to exclude a host of activities that form the real core of the problem."[48] Noting the small handful of criminal conflict cases prosecuted each year, one commentator has suggested limiting the applicability of criminal sanctions to situations "which a prosecutor could reasonably anticipate would lead to a conviction."[49]

The difficulty of employing criminal sanctions to police legislative standards is further exacerbated by the nature of criminal proceedings. Enforcement of penal provisions requires explicit basis of proof and rigid standards of willfullness and intent. Such criteria are particularly difficult to meet in a case involving legislative misconduct where, in general, the appropriate parameters of the representative's job are ill-defined. The requirement of modern representation that the law-maker harmonize an enormous array of pressures makes it virtually impossible to define in any constitutionally acceptable way the multifarious aspects of conflict situations potentially facing legislators. Hence, it is not surprising that the trend is away from criminal sanctions and toward a reliance upon legislative codes of ethics.[50]

B. *Codes of Ethics*

A code of ethics is a statement of acceptable standards of behavior for government officials. It may be contained in a statute[51] or merely in a joint legislative resolution.[52] Moreover, it may be

46 ARIZ. REV. STAT. ANN. § 41-1297 (Supp. 1971-72).
47 *E.g.*, KAN. STAT. ANN. § 75-4304 (Supp. 1971).
48 Eisenberg, *supra* note 4, at 671.
49 Philos, *supra* note 35, at 15.
50 *See, e.g.*, Eisenberg, *supra* note 4.
51 For examples, see note 10 *supra*.
52 *See, e.g.*, Sen. J. Res. 71, 1971 Laws of Maryland 1854.

given impetus by constitutional fiat.[53] Codes provide to the public and the official general standards of approved normative behavior. A legislative committee or other appropriate body may be empowered to enforce code provisions and to draft advisory opinions when clarification is required. A code may incorporate sanctions; however, these are seldom criminal and generally result in reprimand, removal, or a recommendation of further investigation by the appropriate law enforcement official. Implicit in the development of codes is the concept that each situation will be evaluated on its own merits, in light of an individual legislator's unique political milieu. A code of ethics for legislators was recommended 20 years ago by a committee of the American Political Science Association, in order to provide legislators with sorely needed guidance as to appropriate conduct.[54] With these introductory thoughts in mind, it is beneficial to outline the major types of conflict situations addressed by typical codes. Attention will then focus on the character and adequacy of enforcement instruments existing within the states.

One major area addressed by several of the codes deals with the problem of allowing legislators to solicit or accept gifts, compensation, loans, travel, entertainment, or hospitality from any person or group other than the state. Many states have provisions similar to that of Florida which forbids the acceptance of any favors by a law-maker "that might reasonably tend improperly to influence him in the discharge of his official duties."[55] Other states rely on a standard which prohibits acceptance of such gifts under circumstances in which it could reasonably be inferred that the gifts were intended to influence, or could reasonably be expected to influence, the performance of official duties or were intended as a reward for official action.[56] Some proposals suggest that a limit, such as $50, should be set and that any gifts to legislators in excess of this limit be prohibited. Others advise prohibiting "gifts of

53 For example, the Florida Constitution mandates the development of a code of ethics for state officials. FLA. CONST. art. 3, § 18.

54 B. ZELLER, AMERICAN STATE LEGISLATURES 87-88 (1954).

55 FLA. STAT. ANN. § 112.313(1) (Supp. 1973). Florida law also prohibits receipt of any compensation by legislators and public employees for their services except from the state or its subdivisions or as may otherwise be provided by law. *Id.* § 112.313(7).

56 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 268A, §§ 1-4 (1970); TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(c) (Supp. 1972-73).

value that might influence the recipient."[57] Still others advocate a system of reporting gifts.[58]

Another area of potential conflict involves the interest a public official may have in a contract with a public body where the official is in a position to influence the award of the contract. The problem usually arises when a public official is concerned with a potential government contract with a corporation in which he owns stock. In this era of widespread stockholding in major corporations which continually do business with the government, many state codes have exempted small holdings of stock as being of insufficient magnitude to create the reality of appearance of unethical behavior. For example, the Kentucky statute exempts holdings of less than five percent in cases in which legislator himself will be called upon to vote, and of 10 percent or less in other public contract cases.[59] Other states, such as Florida, require that "controlling interests" in corporations doing business with the state must be disclosed by the legislator in the form of a sworn statement filed with the clerk of the circuit court in his home county.[60]

The extent to which legislators, particularly lawyers, may practice or appear before state agencies is a third area of potential unethical behavior. State regulation addressed to this problem realistically recognizes the control legislators exert over an agency's budget, personnel, and jurisdiction and the consequent susceptibility of agencies to even relatively subtle demands of law-makers acting in private capacities. Hence, a few codes have attempted to limit appearances by legislators before state agencies. Kentucky forbids any member of its General Assembly to appear before an agency as a paid expert witness,[61] while New York prohibits

57 ADVISORY COMMITTEE ON ETHICAL CONDUCT, INTERNATIONAL CITY. MANAGER ASSOCIATION, A SUGGESTED CODE OF ETHICS FOR MUNICIPAL OFFICIALS AND EMPLOYEES; ALABAMA ETHICS COMMISSION, REPORT OF THE ALABAMA ETHICS COMMISSION 1 (Rec. No. 1) (1970).

58 De Paul Note, *supra* note 4, at 458.

59 KY. REV. STAT. ANN. §§ 61.096(2), (6) (1971). New York bars legislators from participating in public contracts through corporations in which they own 10 percent or more of the stock unless such contract is made after public notice and competitive bidding. N.Y. PUB. OFFICERS LAW § 73(4) (McKinney Supp. 1971-72).

60 FLA. STAT. ANN. § 112.313(2) (Supp. 1973). Texas speaks of controlling interests. TEX. REV. CIV. STAT. ANN. art. 6252-9(3), § 9 (Supp. 1972-73).

61 KY. REV. STAT. ANN. § 61.096(3) (1971).

representation by a legislator before a state agency on a contingent fee basis.[62] It should be emphasized that appearances before agencies by legislators on behalf of private interests do not necessarily involve the use of unfair influence; however, such circumstances do give an appearance of potential favoritism which is almost as damaging to public confidence as actual unethical conduct.[63] Other proposals would discourage a legislator from accepting cases where there is a reasonable possibility that the agency might be improperly influenced by his participation, or where he has reason to believe he was offered the case in an effort to gain such influence.[64] A proposed method of enforcing these prohibitions would require legislators to report publicly and periodically their cases involving representation before state agencies.[65]

Conflict of interest statutes and comprehensive codes often forbid legislators from accepting or rendering any employment or services for private interests which might impair independent judgment in the performance of public duties.[66] Similar provisions prohibit accepting employment incompatible with public responsibilities.[67] Without these restrictions, one could argue that a legislator's independence of judgment while performing official functions might be impaired. Even if the public official is of the highest integrity, an appearance of conflict may easily arise. The opposing viewpoint is that restricting some areas of private endeavor coincidentally eliminates a broad range of talent from running for office. The financial sacrifice required of talented individuals who wish to enter public life is already high and employment restrictions merely add further financial risks to the already risky business of running for office.

Finally, it is important to mention, if only briefly, the controversial area of disclosure. Disclosure provisions generally re-

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62 N.Y. PUB. OFFICERS LAW § 73(2) (McKinney Supp. 1971-72).

63 De Paul Note, *supra* note 4, at 459.

64 *Id.*

65 Some states attack the state agency problem in a more generalized way by forbidding a legislator from using "his official position to secure special privileges or exemptions for himself or others . . . . " FLA. STAT. ANN. § 112.313(3) (Supp. 1973).

66 *See, e.g.*, FLA. STAT. ANN. § 112.313(6) (Supp. 1973).

67 *See, e.g.*, TEX. REV. STAT. ANN. art. 6252-9, § 4 (Supp. 1972-73).

quire a legislator to file with a public official a statement indicating financial and business interests. Controversies have arisen over questions relating to whose interest should be disclosed, the specific nature of the interest to be disclosed, the confidentiality of the disclosure, mandatory or permissive disclosure provisions, and the time and frequency of disclosures. The states have approached this delicate area in varied manners. Florida legislators must disclose "controlling interests" in entities doing business with or subject to regulation by the state.[68] New York requires a legislator to annually file an affidavit stating each interest retained by himself, his spouse, and children in any activity subject to state regulation and whether or not such interest exceeds $5,000, as well as any other interest which might reasonably be affected by legislative action.[69] These reports are open to public inspection. Nebraska requires legislators to disclose their own major sources of income and those of their spouses and children, but without dollar amounts. Information concerning investments over $5,000 and entities to which professional services are rendered must all be divulged, and it is all available to the public.[70] Arguably, disclosure permits a legislator's colleagues and the public to assess his actions meaningfully, deters deceit by publicity, and forces officials to consider in advance the full implication of potential unethical action. Others may argue that such information is private to the individual, is irrelevant to rational public assessment of an official's action, and is subject to gross misinterpretation and distortion with retraction rarely an effective antidote.

Thus, as revealed above, codes of ethics, if well drafted, both provide behavioral guidelines to legislators and, at the same time, inform the public as to what behavior to expect and demand from their law-makers. Both of these results contribute to the development of behavioral norms with internal sanctions against unethical conduct. Yet, to be fully effective, these codes must be supplemented by an objective and impartial enforcement procedure.

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68 FLA. STAT. ANN. § 112.313(2) (Supp. 1973).
69 N.Y. PUB. OFFICERS LAW § 73(6) (McKinney Supp. 1971-72).
70 NEB. REV. STAT. §§ 49-1106(2)(a), (b), (e) (Supp. 1969).

C. *Enforcement By Legislative Committees*

Some states vest enforcement of their codes of ethics with legislative committees in each house.[71] The state of Washington varies this practice by having the chairmen of the majority and minority caucuses in each house appoint two members of their house and two non-legislators, resulting in two bodies, each composed of four legislators and four lay members.[72] Typically, alleged violations of conflict of interest provisions are brought to the attention of a legislative committee by the presiding officer of the respective house, with whom complaints are usually filed.[73] Under certain circumstances, the presiding officer may appoint a select committee to investigate the complaint and report to the house.[74] Some states provide investigating committees with clearly delineated powers and procedural guidelines,[75] while others vest considerable discretion with the chairman and members of the investigating committee.[76]

In addition to the weaknesses inherent in intramural legislative committee enforcement discussed earlier,[77] it should also be noted that when enforcement action actually does occur, it usually is only an after-the-fact determination or inquiry. Hence, by the time the committee convenes, the public and the press are already aroused and substantial pressure and tension are focused on the members. It is unlikely that a just and equitable determination will emanate from such an emotionally charged situation. Moreover, as one commentator has observed, "hyperbole and sensationalism have become a political convention" and have been refined in legislative investigations.[78] Couple this "over-

71 Minnesota, for example, creates a permanent standing committee on ethics in each house. MINN. STAT. §§ 3.89-.90 (1967).

72 WASH. REV. CODE ANN. § 44.60.020 (1970).

73 *E.g.*, FLA. STAT. ANN. § 112.318(1) (Supp. 1973).

74 *Id.* § 112.318(2).

75 *E.g.*, WASH. REV. CODE ANN. § 44.60.060 (1970).

76 For example, the Florida statute does not provide special procedure and jurisdictional guidelines for the committees, though they are governed by the rules of their respective houses. FLA. STAT. ANN. § 112.318 (Supp. 1973).

77 See text at *supra*.

78 Shils, *Congressional Investigations: The Legislator and His Environment*, 18 U. CHI. L. REV. 571 (1951).

stress" with Manning's concept of "the purity potlach," or escalating political moralism,[79] and it is not difficult to understand why politically dominated and motivated ethics inquiries very seldom reach a publicly credible result.

Several states have developed joint legislative committees to oversee the enforcement of codes of ethical conduct. The joint committee approach attempts to dilute the impact of "in-house" conflict of interest by vesting jurisdiction in a committee composed of members of both houses. Proponents of bicameral committees contend that such an enforcement tool guarantees objectivity in at least half the committee on any one case. Seven states have established joint committees, ranging in size from eight members to four members.[80] Membership is generally split equally between the houses, and provision is usually made for minority party representation. The method of selecting joint committee members sometimes varies between the legislative bodies. In California, members are selected according to the rules of the respective houses;[81] while in Connecticut, members are appointed by the presiding officers and by the leaders of the minority party.[82] Often, the appointment prerogative is granted to the House Speaker and the Senate President, consistent with their powers to appoint other committees.[83] Several of the joint committees are bound statutorily by strict due process requirements, including evidentiary standards which must be met before a formal hearing may be commenced.[84] Moreover, California provides for public

79 Manning, *supra* note 2, at 246.

80 These states are California, CAL. GOV'T CODE §§ 8940-55 (West Supp. 1972) (six members); Connecticut, CONN. GEN. STAT. ANN. §§ 1-69 to 78 (Supp. 1973) (eight members); Illinois, ILL. REV. STAT. ch. 127, § 606 (1971) (four members); Maine, ME. REV. STAT. ANN. tit. 3, § 381 (Supp. 1972-73) (six members); Maryland, Sen. J. Res. 71, 1971 Laws of Maryland 1854 (number of members at discretion of presiding officer); Michigan, MICH. STAT. ANN. § 4.1700(27) (1969) (six members); and New Jersey, N.J. STAT. ANN. § 52:13D-22 (Supp. 1972-73) (eight members).

81 CAL. GOV'T CODE § 8940 (West Supp. 1972).

82 CONN. GEN. STAT. ANN. § 1-69 (Supp. 1973).

83 *E.g.*, N.J. STAT. ANN. § 52:13D-22(b) (Supp. 1972-73). Each house leader appoints four legislators, no more than two of which may be of the same party. *Id.*

84 Due process requirements generally are provided for (*e.g.*, CAL. GOV'T CODE §§ 8944-50 (West Supp. 1972); CONN. GEN. STAT. ANN. §§ 1-71 to -74 (Supp. 1973)), as are prehearing evidentiary standards (CAL. GOV'T CODE § 8945 (West Supp. 1972); CONN. GEN. STAT. ANN. § 1-71 (Supp. 1973)).

hearings,[85] while Connecticut allows a respondent to request an open, public inquiry.[86]

At first glance, joint committees appear to improve on intramural investigating bodies by providing a more objective forum for considering a complaint. Moreover, some of the joint committees provide commendable due process protection for respondents and, in that respect, suggest salutary models for other states. However, it is unrealistic to believe joint committees do not suffer from the same normative political infirmities previously described in relation to single house bodies. Rather than cure this malady, joint committee enforcement prolongs the illness. At the outset, it must be emphasized that normative folkways such as institutional patriotism not only build in-house cohesion, they breed in-house suspicion of "the other body." Bicameral competition is the acceptable and expected mode of behavior in our legislatures. Hence, every conference committee, joint committee, indeed, every major item of legislation is a vehicle for bicameral ploys and competition. While such competitive spirit may be desirable in initiating and developing innovative legislative programs, it certainly can be detrimental when a joint committee must act in a quasi-judicial manner on allegations of conflict of interest. Faced with such inter-house rivalry, a joint committee would have great difficulty in actuality providing an objective and impartial forum.

Moreover, another folkway, reciprocity, is as applicable to bicameral relations as it is to in-house relationships. Bills must be enacted by both houses. This means *quid pro quo* relationships not only develop between members of the same house, but also necessarily between members of different bodies. Actually, reciprocal relations are almost a necessity if a member expects to have his bill enacted into law. Given the suspicion of, and general disinterest in bills passed by the other house, a member tends to rely on a few trusted allies in the other body to shepherd his bill through. The same is expected of him when

85 CAL. GOV'T CODE § 8948(c) (West Supp. 1972).

86 CONN. GEN. STAT. ANN. § 1-73 (Supp. 1973); Hawaii has a similar provision. HAWAII REV. STAT. § 84-31(d) (1968).

bills of his allies reach his house. Such a system of institutionalized mutual assistance makes it difficult for members to act objectively on conflict charges given the fact that their action will be watched and judged by the entire membership of the other house.

Additionally, while single house institutional chauvinism is a prevailing norm, legislators also are concerned with the image of the entire institution, particularly in the eyes of the voters. They are aware that the public frequently does not distinguish between the deeds and misdeeds of the House and the Senate, but often lumps both houses together as "the legislature." Hence, legislators believe that if one of them is censured, they all will suffer from public reproach. Inter-house rivalry, reciprocity, and chauvinism all provide compelling counterforces to joint legislative committees' effectively policing the ethics of legislators. However, other institutional enforcement tools, worthy of serious consideration, have been established within the states.

D. *Extra-legislative Enforcement Bodies*

Perhaps the most promising enforcement tools developed in the states are "extra-legislative" boards or commissions composed of non-legislator as well as legislator members. Such an approach provides a potentially effective contrast to legislator-dominated enforcement entities, the inactivity of which illustrates the "conflict within the conflict of interest laws."[87] Six states have established extra-legislative enforcement committees to police legislators, as well as other officials in some instances.

Louisiana has created a Board of Ethics for State Elected Officials to oversee the ethical practices of members of the legislature and statewide elected officials of the executive branch.[88] The Board is composed of three members: one is appointed by the governor from among retired judges residing in the state; the House and Senate each elect an additional member, who may not

87 As early as 1951, a Senate subcommittee recommended the establishment of a 15-member Commission on Ethics composed of six government officials and nine private citizens. DOUGLAS REPORT, *supra* note 20, at 40-41. For a discussion of the British experience, see Finer, *Congressional Investigations: The British System*, 18 U. CHI. L. REV. 521 (1951).

88 LA. REV. STAT. ANN. § 42:1144 (1965).

belong to the body electing him.[89] The Board is authorized to enforce statutory policies and prohibitions, including regulations it may make to implement them, and to consider all complaints regarding alleged code violations.[90] Upon receiving a complaint, the Board conducts a private investigation to determine if there are adequate grounds for the charge. If adequate grounds are found, a public hearing may be held if a majority of the Board so votes.[91] For both investigations and hearings, written notice is required to be given the party involved,[92] and the Board is granted broad powers of subpoena, discovery, and access to witnesses.[93] Respondents are granted the rights to be represented by counsel, to cross-examine witnesses, and to call witnesses and present evidence.[94] Indeed, all hearings are bound by general Louisiana criminal procedure laws.[95] If the Board fails to reveal substantial evidence to support the charge, the case is officially closed.[96] However, if the Board determines that the code has been violated, it forwards a copy of its findings to the appropriate local prosecutor.[97] Any action by the Board against any official must be taken at a public hearing, but the Board can also hold private hearings.[98] The records of the Board obtained in connection with private hearings and investigations are confidential, though the prosecutor has full access in the event that a violation is found.[99] The Board is authorized to render advisory opinions to officials as well as interested citizens and may provide reports and make recommendations to the governor and legislature concerning conflict of interest matters.[100]

Nebraska's Conflicts of Interest Committee is generally similar in jurisdiction and procedural requirements to its Louisiana

89 *Id.* §§ 42:1144(A)(1)-(3).
90 *Id.* §§ 42:1144(E)(2)-(4).
91 *Id.* § 42:1144(E)(5)(a).
92 *Id.*
93 *Id.* § 42:1144(E)(5)(b).
94 *Id.* § 42:1144(E)(5)(d).
95 *Id.* § 42:1148.
96 *Id.* § 42:1144(E)(5)(h).
97 *Id.* § 42:1144(E)(6).
98 *Id.* §§ 42:1144(E)(5)(a)-(b).
99 *Id.* §§ 42:1144(E)(5)(i), (6).
100 *Id.* § 42:1144(E)(7).

counterpart.[101] However, the seven-member commission is composed of four legislators, two private citizens, and one elected member of the executive branch.[102] The legislative members are elected by secret ballot of the legislature.[103]

In contrast to Louisiana and Nebraska, New York provides for only a minimum of non-legislative involvement. It vests enforcement of the ethics code with the two separate legislative committees.[104] The four-member Assembly and Senate committees are appointed by the Assembly Speaker and Senate President, respectively, and the president of the state bar association and the dean of the Albany Law School serve as advisory members of both.[105]

The committees investigate complaints alleging violation of the statutory code of ethics and other conflicts of interest provisions[106] and transmit findings to their respective houses and to the appropriate prosecutor if necessary.[107] The committees may publish advisory opinions, and their records are confidential, though they may be released at the discretion of the committees.[108]

The Kansas Committee on Government Ethics is composed of five members, two appointed by the governor, one by the Chief Justice of the Supreme Court, and one each by the House Speaker and the President of the Senate, and none may be a public officer or employee.[109] In contrast to the above mentioned enforcement bodies, the Kansas Committee is more advisory in scope; however, action by public officials in compliance with a committee opinion is presumed to be valid.[110] The Committee's advisory opinions are public.[111]

Texas has established a state ethics commission to enforce its statutory standards of conduct of state employees and legislators. The commission membership includes three representatives

101 NEB. REV. STAT. §§ 49-1105, 1110-16 (Supp. 1969).
102 *Id.* § 49-1105.
103 *Id.*
104 N.Y. LEGIS. LAW § 80(1) (McKinney Supp. 1972-73).
105 *Id.*
106 N.Y. PUB. OFFICERS LAW § 73.74 (McKinney Supp. 1971-72).
107 N.Y. LEGIS. LAW § 80(2)(a) (McKinney Supp. 1972-73).
108 *Id.* §§ 80(2)(b)(1), (4).
109 KAN. STAT. ANN. § 75-4303(a) (Supp. 1971).
110 *Id.* § 75-4303(c).
111 *Id.*

elected by the House, three senators elected by the Senate, two persons appointed by the presiding Judge of the Court of Criminal Appeals, and two persons appointed by the Chairman of the State Judicial Qualifications Commission.[112] Of note is the debilitating requirement that the commission may take action only upon a vote of a majority including at least two legislator members representing the same house as the respondent when the respondent is a legislator.[113]

Finally, there is the unique Hawaii State Ethics Commission. Five members are appointed by the governor to the Commission from a panel of 10 persons nominated by the state's Judicial Council; none of the nominees are legislators as it is required that members of the Commission hold no other office for which they receive compensation.[114] The Commission may receive and consider complaints of alleged violations of the statutory standards of conduct, and it may initiate charges at the request of two members.[115] It may render opinions, but if none is rendered within 30 days following a request, the facts and circumstances about which the opinion was requested are deemed not to constitute a violation of the code.[116] Such a constructive opinion is binding on the Commission in the same manner as a formal opinion, with narrow exceptions.[117] The Commission may conduct a confidential preliminary investigation of a complaint and render an informal advisory opinion. If the party charged fails to comply with such opinion, or if a majority of the members believe probable cause of a violation exists, a statement outlining the nature of the charges is served on the respondent. The respondent is then given 20 days to answer the charges in writing. If a majority of the Commission then concludes there is reason to believe that a violation of the standards has occurred, a hearing follows.[118] Significantly, all action taken by the Commission, including investiga-

112 TEX. REV. CIV. STAT. ANN. art. 6252-9, § 8(a) (Supp. 1972-73). For specific statutory standards of conduct to be enforced, see *id.* § 4.

113 *Id.* § 8(i).

114 HAWAII REV. STAT. § 84-21 (1968). Commissioners receive annual, per diem, and travel "allowances" under §§ 24-1 to -8.

115 *Id.* §§ 84-31(a)(3), (b). For the standards of Conduct, see *id.* §§ 84-11 to -18.

116 *Id.* § 84-31(a)(2).

117 *Id.*

118 *Id.* §§ 84-31(b), (d).

tions and hearings, must be authorized by a formal resolution supported by three of the five members, and such resolutions must define the nature and scope of their inquiry.[119] Hearings are closed to the public unless the respondent requests an open forum.[120] Respondents are guaranteed the right to be heard, to subpoena witnesses and evidence, to be represented by counsel, and to cross-examine.[121] Commission findings must be based on competent and substantial evidence, and any decision must be written and supported by a majority vote.[122] If on the basis of such hearing the Commission finds sufficient cause, a complaint containing a statement of the facts is referred to the legislature. If within 30 days after the referral, the legislature fails to formally declare the charges contained in the complaint insubstantial or fails to commence proceedings on the complaint, the Commission's charges are made public, with the clear caveat that the merits of the charges have never been determined. Days during which the legislature is not in session are not included in determining the 30-day period.[123]

Enforcement committees external to the legislature provide the strongest potential for impartial and objective administration of legislature codes of ethics. Several helpful precedents presently exist in the states and provide substantial guidance in developing substantive criteria for a strong enforcement scheme. The following discussion draws upon, and adds to, these precedents in order to outline a model enforcement plan centered around an effectively functioning independent commission. Although these criteria are oriented to state legislatures, they are also applicable, with a few modifications, to Congress. The following criteria are suggested as a starting point for the statutory development of such a commission.

IV. A Proposal for a State Legislative Ethics Commission

A. There should be established an independent state legislative ethics commission. The commission should be com-

119 *Id.* § 84-31(a)(4).
120 *Id.* § 84-31(d).
121 *Id.*
122 *Id.* §§ 84-31(d), (e).
123 *Id.* § 84-32(a).

posed of seven members. Five non-legislative members should be appointed by the governor from among a panel of at least 10 persons nominated by the state judicial council, judicial nominating commission, or analogous body. The additional two members should be appointed by the Speaker of the House and the Senate President, respectively, from among the active membership of each house.

COMMENT: The establishment of an enforcement body external to the legislature will provide an impartial tribunal, unfettered by direct political pressure, to enforce legislative codes of ethics. Such an independent body will not be paralyzed by the normative pressures which have vitiated efforts of legislative enforcement committees. In contrast to inflexible criminal sanctions, the commission will be able to deal with subtle conflict of interest issues and will be able to provide guidance to legislators before action is taken. In a similar vein, enforcement of ethical standards will not lag due to the inability or hesitancy of public prosecutors to enforce harsh sanctions in complex situations which are not clearly violative of criminal statutes. Moreover, the establishment of an independent enforcement body, composed of prestigious members, will serve to build public confidence both in public office and, specifically, in the legislature.

Major appointment prerogative is vested in the state's chief executive officer, the governor, who is empowered to appoint five of the seven members. Such authority is given the governor for several reasons. First, he is traditionally charged with enforcing the laws of the state and should therefore be sensitive to the problems of enforcing complex areas of the laws. Second, the governor is a highly visible, elected official whom the public can hold responsible for the quality of his appointments or for any lax enforcement by commission members. Third, the governor must necessarily maintain a statewide perspective on issues. He will want good, representative people placed on the commission. If the governor cannot find candidates he is willing to appoint from the initial list given him, he may request additional names.

To help the governor find his appointees, the state judicial council or state judicial nominating commission will submit a list of at least 10 nominees. Such bodies are generally experienced in assessing judicial qualities and are familiar with the state talent

pool. They also have established selection procedures which will expedite the nomination process. Moreover, these entities possess substantial public credibility which will further enhance the legitimacy of the commission's role and responsibility. States that do not have such judicial entities should vest the nomination power in a commission composed of retired judges, public officials, and other prestigious citizens.

Two additional members of the commission are to be appointed by the Speaker and the Senate President from among the active membership of the houses. These law-makers will lend valuable insight and perspective to commission deliberations. Moreover, the legislative members will also serve as liaisons between the commission and the houses in cases where sanctions are recommended to the legislature. Vesting appointment power in the presiding officers recognizes their traditional prerogative to appoint committees and legislative members of independent bodies. They alone possess an overview of the respective talents of all members and will therefore be in a unique position to appoint the best qualified members to the commission.

An independent enforcement commission external to the legislature should provide an effective remedy to the problem that has been termed the "conflict within the legislative conflict of interest laws." Such an entity will facilitate impartial determination of conflicts of interest charges in a relatively expeditious and objective manner. It will remove direct enforcement from the legislature and in so doing will serve to dispel public skepticism concerning intramural policing of legislature standards of conduct.[124] Ultimately, independent commissions may help to raise public expectations concerning the legislative process, which, if fulfilled by the members, will result in more effective and credible government in the states.

The exact cost of operating a commission such as suggested in this article will vary from state to state depending on the size of the commission, per diem rates, level of compensation paid to members, and the nature and number of cases dealt with by the

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124 "Experience has shown that the prospect of getting a full disclosure of abuses from Congress itself is almost equivalent to that of getting complete military inspections in the Soviet Union." Washington Post, Apr. 15, 1963, at A12, col. 2.

commission. Hence, this article has not attempted to suggest any base operational figure. A total of $2,500 was appropriated to the Joint Boards for Washington State in 1970.[125]

B. The commission should be empowered to initiate, receive, and consider charges of alleged violations of codes of conduct or appropriate statutory provisions. It should be authorized to render advisory opinions and should be required to render such opinions within a reasonable time following a request. The commission should also administer any disclosure requirements mandated by the state as well as lobbyist registration.

COMMENT: An effective commission clearly requires power to initiate investigations on its own motion as well as authority to receive and consider third party complaints. To deter frivolous investigations, the consent of a majority of the committee should be required before an investigation is authorized. Any person should be able to bring a complaint before the commission, and provision should be made so that background data can be supplied to accompany the charges. Some states require a signed written complaint and an affidavit that the person bringing the charges will appear before the commission if a hearing is necessary. Such provisions are salutary in that they will deter frivolous allegations and will afford the charged law-maker an opportunity at a hearing to confront and cross-examine his accuser.

Rendering of advisory opinions will be one of the commission's most significant, as well as time-consuming, tasks. One of the problems with enforcing criminal statutes is that enforcement occurs after the fact, if at all. With the commission, a legislator may request an opinion far in advance of proposed action and may be provided an appropriate standard to guide future action. In this manner, a body of precedent will build which, hopefully, will provide clear guidelines in a variety of potentially sensitive situations. Opinions should be made public, with any deletions as the commission deems proper, so that all interested parties may be informed of the latest standards.

Moreover, to be effective, opinions must be developed within a

125 THE SECOND BIENNIAL REPORT OF THE JOINT BOARDS OF LEGISLATIVE ETHICS TO THE WASHINGTON STATE LEGISLATURE (1971).

reasonable time after the request. A prompt opinion is particularly important when the action in question may occur in a short period of time. Hopefully, most members will try to predict possible conflict situations and will request an opinion well in advance. However, realistically this will not be the case. Hawaii has responded to this problem by providing that if no opinion is rendered within 30 days, the factual situation that gave rise to the opinion is deemed for the purposes of any later commission action not to violate the code.[126] While this is a good interim approach, it does not adequately consider the problem of a 60-day session, where within the 30 days' leeway, the vote or committee action in question may have already taken place. During the session, therefore, the commission may have to meet weekly or bi-weekly, depending on the number of requests and the length of the particular session. The Hawaii approach, by which no commission response is considered tantamount to no violation, is worthwhile pursuing since it will cut down on the commission's administrative burden. However, the 30-day period for commission response should be reduced. Moreover, "no response" opinions should be made public and included in any compilation of opinions the commission develops.

As the prime enforcement instrument of the conflict laws, the commission should be vested with enforcement of any disclosure provisions.[127] Moreover, if enforcement of the disclosure provisions is granted the commission, it should also administer lobbyist registration requirements mandated in most states. Such information is often utilized by the same persons and should be conveniently located in one central location. At present, overburdened clerks of the house must register lobbyists.[128] In some states, lobbyists must register with the Secretary of State, who often has no interest or authority in enforcing such laws or rules.[129] In contrast,

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126 HAWAII REV. STAT. § 84-31(a)(2) (1968).

127 This is the arrangement under Hawaii law. HAWAII REV. STAT. § 84-31(a)(1) (1968).

128 *See, e.g.*, Rule 13.1, Rule of the Florida House of Representatives, 1970-72. During the 1972 Regular Session of the Florida Legislature, a total of 1179 persons registered with the Clerk of the Florida House of Representatives (statistics compiled by the Clerk of the House, Allen Morris, June 23, 1972).

129 *See, e.g.*, ILL. REV. STAT. ch. 63, §§ 171-77 (Supp. 1972).

the commission will provide a convenient and interested focal point for enforcing the lobbyist registration laws.

Since advisory opinions are vital to proper enforcement of the conduct codes, the commission must possess adequate staff to help develop such opinions. A study of the recently enacted Massachusetts conflict of interest legislation revealed that during the first two years this legislation has been in effect, the Attorney General, who has the responsibility for issuing advisory opinions, released some 300 opinions, about a third of which were issued during the first month.[130] Hence, appropriate staff support will be required by the commission, particularly during the first year of operation.

> **C. When a complaint is filed with the commission, a copy should promptly be sent to the person alleged to have committed the violation. If the commission determines the complaint does not allege facts sufficient to constitute a code or statutory violation, the complaint should be dismissed and the complainant and respondent notified. If the commission determines the complaint does allege facts sufficient to constitute a code or statutory violation, it should promptly investigate the alleged violation. If, after such preliminary investigation, the commission finds that probable cause exists to support an alleged violation, it should convene a hearing on the matter within a reasonable time after making such determination. All commission investigations and records relating to the preliminary investigation should be confidential.**

COMMENT: Legislation should insure that the named respondent receives a copy of the complaint as soon as it is filed with the commission. Fair play and due process dictate such action. The commission should initially assess the adequacy of the complaint based on alleged facts and reasonable inferences drawn therefrom. After this initial analysis, a decision should be made as to whether the complaint merits further investigation. If it is decided that such investigation is unwarranted, the case should be dismissed and the parties notified. However, if an investigation is ordered, it should be carried out promptly and confidentially. It is im-

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130 Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 BOS. L. REV. 299, 386 (1965).

portant to stress the need for strict confidentiality at this preliminary stage of the proceedings, where only an investigation is being carried out. Public disclosure at this point, before all the facts are in and before the commission considers the question of a further hearing, might cast unwarranted aspersions on the involved member and might seriously jeopardize his political career. As an adjunct to the preliminary investigation, the commission may wish to afford the named member an opportunity to explain the alleged wrongful conduct.[131] If, following the investigation, the commission finds there is probable cause to support an alleged violation, it should convene a hearing within a reasonable time, probably not longer than 30 days after it makes such determination.[132] If probable cause does not exist, the charges should be dismissed. In either case, the parties should be notified promptly. All commission action should be recorded in writing and the consent of a majority of the membership should be required to take any action, including dismissal, convening of a hearing, preliminary investigation, and initiation of an investigation on its own motion.

> **D. If a hearing is to be held, the respondent should be able to examine and make copies of all evidence in the commission's possession relating to the charges. In addition, the commission should be authorized to issue subpoenas and subpoenas duces tecum at the request of any interested party. At the hearing, the charged party should be afforded appropriate due process protection consistent with state administrative procedures, including the right to be represented by counsel, the right to call and examine witnesses, the right to introduce exhibits, and the right to cross-examine opposing witnesses.**

COMMENT: To protect the constitutional integrity of commission hearings, the person charged with a violation must be granted the full panoply of due process rights. We have previously discussed the failure of most legislatures to provide adequate guidelines and procedural standards to investigating committees. Such inaction invariably means that answers to basic questions, such as whether the respondent may cross-examine witnesses, become

131 *Cf.* HAWAII REV. STAT. § 84-31(b) (1968).

132 CAL. GOV'T CODE § 8945 (West Supp. 1972).

tainted with political expediency. In such situations, the accused party is often denied due process and the public loses confidence in "star chamber" proceedings. The above suggested standard grants the charged official full due process rights so that he may present his case to the commission in a fair and non-prejudicial manner. Such procedures will enhance the official character of the proceedings and will serve to legitimize further the commission's action. If possible, hearing provisions should reflect rights afforded parties to a quasi-judicial hearing pursuant to statutory administrative procedure acts.

One of the most controversial issues in developing hearing procedures is whether to open the hearing to the press and the public. Some states exclude the public unless otherwise requested by the respondent,[133] while others require open hearings in all cases.[134] Such a decision must balance the public's right to know against the right of the accused to privacy. Given that all preliminary commission proceedings will be confidential, and that a hearing will not be called unless the charges are supported by a finding of probable cause, it is suggested that formal hearings should be open to the public. Opening the hearings to the "sunshine" of public scrutiny[135] will reassure the public that such proceedings are being carried out in a fair and impartial manner. Moreover, open hearings will provide a deterrent to private dealing and an antidote to ex parte action relating to cases before the commission. While public hearings may not materially affect the probity of the proceedings, they will at least provide the full picture to the press and public. Moreover, they will present a positive image of commission proceedings to the electorate, which may actually be more important for maintaining governmental legitimacy than the actual outcome of the proceedings.

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133 CONN. GEN. STAT. ANN. § 1-73 (Supp. 1973); HAWAII REV. STAT. § 84-31(d) (1968). While closed hearings can be conducted in Louisiana, action must be taken at an open hearing. LA. REV. STAT. ANN. § 42:1144(E)(5)(a) (1965).

134 CAL. GOV'T CODE § 8948 (West Supp. 1972).

135 In 1913, Justice Brandeis wrote: "Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1913). For examples of effective state legislation dealing with open government meetings, see Florida Sunshine Law, FLA. STAT. ANN. § 286.011 (Supp. 1973); CAL. GOV'T CODE §§ 54950-60 (West 1966); N.M. STAT. ANN. § 5-6-17 (1953).

E. Any person whose name is mentioned at any investigation or hearing should be entitled to testify or file a sworn statement with the commission if he feels he is adversely affected.

COMMENT: This provision will enable an outside party, who may not be called as a witness by either side, to present a statement of facts to the commission relative to testimony which such person feels may adversely affect him. It will thus allow the person to insert his version of the questionable information into the record.

F. After the hearing, the commission should state its findings of fact. If the commission, based on competent and substantial evidence, finds the respondent has violated a code or statutory provision, it should state its findings in writing in a report to the presiding officer of the house in which the respondent serves. Such report should be supported and signed by a majority of the commission members. If the commission finds the respondent has not violated a code or statutory provision, it should dismiss the charges. In either case, the respondent, the complainant, the attorney general, and the appropriate local prosecutor should be apprised promptly of the commission's action and its report.

COMMENT: Significant to this guideline is the requirement that commission determination that a violation has occurred must be based on competent and substantial evidence.[136] Such a standard incorporates the substantial evidence test generally applicable to administrative agency determinations. The suggested burden of proof, therefore, attempts to mesh the quasi-judicial as well as the quasi-legislative responsibilities of the commission. Moreover, it will provide a comprehensible and generally acceptable standard to guide commission deliberations.

G. If within 30 days after referral of the commission's report to the presiding officer, the legislature neither formally declares the charges contained in the complaint insubstantial nor institutes hearings on the report, the commission should make public the report, with a clear caveat that the legislature has not yet formally determined the merits of the case.

COMMENT: In the majority of states, ultimate sanction against unethical conduct rests with the legislative body, which alone

136 *Cf.* HAWAII REV. STAT. § 84-31(d) (1968).

may censure, dismiss, or otherwise punish one of its members, except in cases of criminal violations.[137] Hence, commission findings and recommendations must be sent to the appropriate house for final consideration. If the commission is to remain an effective enforcement tool, the legislature, of course, cannot be allowed to ignore the report. Hence, the suggested guidelines, based on the Hawaii legislation,[138] provide an incentive for the legislature to consider expeditious action on the commission report. If no legislative action is forthcoming in one month following submission, the commission's findings and report are made public. Faced with the possibility of public exposure due to inaction and consequent embarrassment, the legislature is likely to make some disposition of the report. Moreover, once the report is publicly released, it is unlikely that public and press pressure will relent until appropriate legislative action is taken.

An alternative approach would be simply to release the commission's final report to the public at the same time it is transmitted to the presiding officer.[139] Such a procedure would certainly draw immediate attention to the commission's findings, but might also yield undesirable results in the form of objectionable pressures being brought to bear on legislators before they have had an opportunity to consider the report. The suggested guideline appears to balance the public's right to be informed of the findings with the positive aim of allowing members to digest the report unfettered by rampant emotionalism.

> **H. The commission should maintain a record of its investigations, inquiries, and proceedings. All records, complaints, documents, and reports filed with the commission should be kept confidential and should not be open to inspection by any person other than a commission member or employee, except as specifically provided for previously. The commission should be able to authorize release to the attorney general or local prosecutors by formal resolution. All matters**

137 However, the New Jersey Joint Legislative Committee on Ethical Standards is authorized to levy penalties of between $100-500 without approval of either house. N.J. STAT. ANN. 52:13D-22(j) (Supp. 1972-73).

138 This is the same requirement as provided by HAWAII REV. STAT. § 84-32(a) (1968). *See also A Conflict of Interest Act*, 1 HARV. J. LEGIS. 68 (1964).

139 ALABAMA ETHICS COMMISSION, REPORT OF THE ALABAMA ETHICS COMMISSION 25 (1970).

presented at a public hearing should be public record. In addition, once a final report is made public following legislative inaction or once legislative consideration of the report commences, the commission's records should also become public. Finally, any commission member or employee who divulges any confidential matter should be guilty of a misdemeanor.

V. Conclusion

This article has attempted to outline the major causes underlying ineffective enforcement of legislative codes of ethics. In doing so, it concluded that intramural enforcement or in-house policing by legislators was largely ineffectual. The cause underlying such lax enforcement was found to be the normative expectations prevalent in the legislative system which, though they provide internal institutional cohesion, also vitiate legislative efforts to enforce codes of conduct against their members. Such a situation has given rise to what may be labelled the "conflict within the legislative conflict of interest laws." One way to combat such a conflict is to divest the legislature of its prime enforcement authority and vest such power in an independent commission composed primarily of gubernatorial appointees, recommended by state judicial councils or nominating commissions. If provided with adequate due process safeguards designed to protect the constitutional probity of its proceedings, the commission should serve as an impartial and objective forum to consider cases of alleged misconduct on the part of legislators. In addition, the very nature of its public proceedings will ultimately enhance the public credibility of the legislature and state government in general.

Once established, the role of the commission could be expanded to include enforcement of executive branch codes of conduct. It might also serve to regulate lobbyist activity as well as the conduct of legislative and executive branch employees. Moreover, it could also help to enforce campaign contribution disclosure laws. The idea of an independent enforcement commission has already been embraced by a few states. It is a challenging concept that deserves serious consideration not only by each state legislature but also by the United States Congress.

PUBLIC REGULATION OF PRIVATE FORESTRY: A SURVEY AND A PROPOSAL

JOHN D. AYER*

Introduction

In the recent case of *Bayside Timber Co. v. Board of Supervisors*,[1] a California court invalidated portions of the California Forest Practice Act.[2] The decision left California substantially without state regulation governing logging and related activities on private land for the first time in a quarter century.[3]

The issue of the regulation of private forests has also emerged in other jurisdictions. In recent years at least two states have adopted substantially new acts regulating private forestry,[4] and at least one more has strengthened an old act.[5] Other states have adopted new laws concerning particular aspects of forestry.[6] The

*Professor of Law, School of Law, Martin Luther King Hall, University of California, Davis; B.A., 1963, University of Louisville; J.D., 1968, University of Louisville; LL.M., 1969, Yale.

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1 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (Ct. App. 1971).

2 CAL. PUB. RES. CODE §§ 4521-618 (West 1972).

3 Following the *Bayside* decision the Committee on Natural Resources and Conservation of the California Assembly, chaired by Representative Edwin L. Z'Berg (D.-Sacramento), commissioned the Institute of Ecology of the University of California at Davis to assemble a research team to propose a new act. A proposal did emerge, the text of which appears in the report PUBLIC POLICY OF CALIFORNIA FOREST LANDS [hereinafter cited as DAVIS REPORT], prepared for the Assembly Committee by the Institute. This proposal, introduced as A.B. No. 2346 (the Z'Berg-Warren Bill) died in the Assembly Ways and Means Committee. *See* 1972 ASSEMBLY WEEKLY HISTORY 689. The legislature did authorize the State Board of Forestry to adopt gap-filling temporary rules. CAL. PUB. RES. CODE § 4580.5 (West 1972).

4 NEV. REV. STAT. §§ 528.010-.090 (1971); ORE. REV. STAT. §§ 527.610-.990 (1971). See text at notes 80-88 *infra*.

5 MASS. GEN. LAWS ANN. ch. 132, §§ 40-46 (1958), *as amended* MASS. GEN. LAWS ANN. ch. 132, §§ 43, 45-46 (Supp. 1972). See text at notes 78-79 *infra*.

6 See text at notes 103-08 *infra*.

subject also appears to be under consideration in other states[7] and in Congress.[8]

The revived activity concerning this long-dormant topic suggests that it is time to review the history and present status of some issues in forest regulation.[9] Part I of this paper summarizes the long and often tumultuous history of the regulation issue. Part II surveys recent developments and current legislative proposals. Part III outlines a proposal, patterned after one developed in California after the *Bayside* case, for a new forest regulatory act.

I. Forest Policy: A Capsule History

Efforts to formulate a public policy for the maintenance of forest resources in this country began about a century ago.[10] Prior to that time substantially all logging in this country was conducted on a cut-and-get-out basis, as if the supply of timber was infinite and efforts to maintain sustained yield were uneconomic.[11] In the late 1860's however, critics began to challenge the concept of unlimited supply.[12] The basic theme of the challenge was "timber famine" — the spectre of imminent depletion of the national timber resource.[13] Other forestry issues, such as the need to protect forests to preserve watershed lands for water supply were identified, but treated as of secondary importance.[14] The

7 *E.g.*, letter from Lawrence M. Jakub, Assistant for Environmental and Legal Affairs, Montana Department of Natural Resources and Conservation, to the author, June 26, 1972; letters from Samuel S. Cobb, Director, Bureau of Forestry, Commonwealth of Pennsylvania, to the author, June 6 and 29, 1972.

8 See text at notes 54-65 *infra*.

9 Law review articles concerning forest regulation are surprisingly few. The most notable recent contribution is Comment, *Trees, Earth, Water, and Ecological Upheaval: Logging Practices and Watershed Protection in California*, 54 Calif. L. Rev. 1117 (1966). *See also* Note, *State Laws Limiting Private Owner's Right to Cut Timber*, 1952 Wis. L. Rev. 186.

10 *See* H. Clepper, Professional Forestry in the United States 14-30 (1971); S. Dana, Forest and Range Policy 73-97 (1956); W. Greeley, Forest Policy (1953) [hereinafter cited as Greeley I]. A provocative analytical work is A. Worrell, Principles of Forest Policy (1970). *See generally* J. Hurst, Law and Economic Growth (1964) (concerning Wisconsin).

11 *See* Greeley I, *supra* note 10, at 145-51.

12 Clepper, *supra* note 10, at 135.

13 Greeley credits Gifford Pinchot with coining the phrase. W. Greeley, Forests and Men 69 (1951) [hereinafter cited as Greeley II].

14 *Cf., e.g.*, Clepper, *supra* note 10, at 135-36.

challenge to prevailing forest management practices grew through the late 19th and early 20th centuries into our first great national conservation crusade.[15] The major goal and the signal accomplishment of this crusade was the creation of the national forest system.[16] The federal government during this period paid little attention to forestry on non-public lands.[17]

After World War I, attention shifted to the regulation of private forest practices.[18] Once again the main concern was the prospect of timber famine, coupled with the fear that the country could not rely upon private enterprise to preserve supply.[19] Concern over this second issue waxed and waned for some 35 years. In every major battle of this protracted conflict, the advocates of regulation of private forests failed to achieve their stated goals. Nevertheless the desire for regulation influenced virtually every debate and important policy decision in that period.

The first battle of the campaign to regulate private forestry took place between 1920 and 1924. The outcome split the hitherto unified forestry profession in two and essentially shaped the form of the conflict for the ensuing generation. The battle is perhaps best understood in the context of the personalities of its principal antagonists. On the side of regulation was Gifford Pinchot, the dominant figure in the conservation movement from the turn of the century.[20] Opposing him was William B. Greeley, chief forester of the United States from 1920 to 1928, who is not nearly so well remembered as Pinchot but who exercised much greater influence on private forestry.[21] While Pinchot advocated comprehensive federal regulation of private forest practices,

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15 *See generally* S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY 27-48 (1959). For a biographic account of the movement's leading figure, see M. MCGEARY, GIFFORD PINCHOT 19-210 (1960).

16 *See generally* DANA, *supra* note 10, at 98-207. On the Forest Service generally, see M. FROME, THE FOREST SERVICE (1971).

17 *See* CLEPPER, *supra* note 10, at 136-37; DANA, *supra* note 10, at 170-74.

18 *See generally* CLEPPER, *supra* note 10, at 135-65; DANA, *supra* note 10, at 208-322; Hamilton, *The Federal Forest Regulation Issue*, FOREST HISTORY, Apr. 1965, at 2-11.

19 The basic document is Committee for the Application of Forestry, Society of American Foresters, *Report*, 17 J. FORESTRY 911 (1919).

20 Concerning Pinchot's role, see CLEPPER, *supra* note 10, at 136-39.

21 For a vivid, if inevitably partisan, personal account of these events, see GREELEY II, *supra* note 13, at 87-114.

Greeley contended that what private landowners needed was not regulation but support. Greeley argued that, given the proper inducement, private landowners would manage their land in keeping with desirable public goals.

Greeley put his personal impress on the first major piece of private forestry legislation, the Clarke-McNary Act of 1924,[22] which remains the basic federal policy on the topic today. Following Greeley's idea that private owners needed security of investment, Clarke-McNary provided greatly expanded public subsidies for fire protection[23] and for tree seedlings.[24] Subsequent legislation has continued this pattern of subsidy and support. The McSweeney-McNary Act,[25] passed in 1928, initiated the program of federal forestry research that continues today; and the Norris-Doxey Act of 1937[26] created "farm foresters," public specialists who give forestry advice to private landowners.

State regulation to assure reforestation through the first 40 years of this century was sporadic.[27] A few states passed what came to be known as "seed tree laws," which limited the cutting of young growth to assure a continuing crop. Nevada in 1903 passed the first such law;[28] four states followed.[29] Enforcement, however, was minimal.[30]

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22 Act of June 7, 1924, ch. 348, 43 Stat. 653, *as amended* 16 U.S.C. §§ 471(b), 505, 515, 564-70 (1970). *See* S. REP. No. 28, 68th Cong., 1st Sess. (1924). Aspects of the Clarke-McNary Act were foreshadowed in the Weeks Act, Act of March 1, 1911, ch. 186, 36 Stat. 961, 16 U.S.C. §§ 500, 513-19, 521, 552, 563 (1970), but Clarke-McNary was much more pervasive and consequential in its coverage.

23 Act of June 7, 1924, ch. 348, § 2, 43 Stat. 653, *as amended* 16 U.S.C. § 565 (1970).

24 Act of June 7, 1924, ch. 348, § 4, 43 Stat. 654, *as amended* 16 U.S.C. § 567 (1970).

25 Act of May 22, 1928, ch. 678, 45 Stat. 699, *as amended* 16 U.S.C. §§ 581-81i (1970).

26 Act of May 18, 1937, ch. 226, 50 Stat. 188 (repealed 1950). *See also* Cooperative Forest Management Act of 1950, 16 U.S.C. §§ 568c, 568d (1970).

27 *See generally* CLEPPER, *supra* note 10, at 82-101. One possible exception to the general rule of non-intervention during the first part of the century is in the field of tax reform. *See generally* W. DUERR, FOREST ECONOMICS 436-37 (1960); Fairchild, *Forest Taxation in the United States*, USDA MISC. PUBLICATION 218 (1935), summarized in GREELEY II, *supra* note 13, at 112-14; Note, *Forest Taxes and Conservation*, 53 HARV. L. REV. 1018 (1940).

28 [1903] Statutes of Nevada ch. 93 (repealed 1955).

29 IDAHO CODE §§ 38-301 to 312 (1961), *as amended* IDAHO CODE § 38-309 (Supp. 1972) (originally enacted in 1937); N.H. REV. STAT. ANN. §§ 221:12-:17 (1964) (originally enacted in 1921); N.M. STAT. ANN. §§ 62-1-1 to -5 (1960), *as amended* N.M. STAT. ANN. § 62-1-2 (Supp. 1971) (originally enacted in 1939); LA. REV. STAT. ANN. § 56:1493 (1952) (originally enacted in 1922).

30 DANA, *supra* note 10, at 302.

The sporadic pattern of state legislation might have continued had it not been for the efforts of Earle H. Clapp, who became acting Chief Forester in 1939.[31] Clapp's campaign for federal regulation which lasted throughout his four-year tenure provoked characteristic industry resistance. But his adversaries also pressed an alternative strategy, short of outright opposition. They took the position that regulation, if undertaken at all, should be performed by the states rather than the federal government.[32] Responding in part to this new strategy, 13 states, including some of the nation's largest timber producers, passed forest practice acts between 1940 and 1950.[33]

These acts passed in the forties were diverse. A few sought only voluntary compliance.[34] Several contained preambles or state-

31 On Clapp's tenure, see CLEPPER, *supra* note 10, at 152-59; GREELEY II, *supra* note 13, at 212-13. Clapp's position is set out in *Hearings on Forest Lands of the United States Before the Joint Comm. on Forestry*, 75th Cong., 1st Sess., pt. 8, at 1881-906, 1956-69, 1992-94 (1940).

32 The idea of state regulation as an alternative to federal regulation dates back at least to the 1920's; it grew increasingly prominent as the campaign for federal regulation heated up in the 1940's. For an account of the internecine conflict in the Roosevelt administration over the issue, see CLEPPER, *supra* note 10, at 152-62.

33 SOCIETY OF AMERICAN FORESTERS, FOREST PRACTICES DEVELOPMENTS IN THE UNITED STATES, 1940-55 (1956) [hereinafter cited as SAF SURVEY] lists the 13 states. CAL. PUB. RES. CODE §§ 4521-618 (West 1972) (originally enacted in 1945); FLA. STAT. ANN. §§ 591.27-.34 (1962), *as amended* FLA. STAT. ANN. §§ 591.28-.30, .33, .34 (Supp. 1972-3) (originally enacted in 1943); MD. ANN. CODE art. 66c, §§ 388-400 (1970) (originally enacted in 1943); MASS. GEN. LAWS ANN. ch. 132, §§ 40-46 (1958), *as amended* MASS. GEN. LAWS ANN. ch. 132, §§ 43, 45-46 (Supp. 1972) (originally enacted in 1943); MISS. CODE ANN. §§ 23:6046-10 to -23 (1952) (originally enacted in 1944); MO. REV. STAT. ANN. §§ 254.010-.300 (1963), *as amended* MO. REV. STAT. ANN. §§ 254.070, .110 (Supp. 1972-73) (originally enacted in 1945); N.H. REV. STAT. ANN. §§ 79:1-27 (1970), *as amended* N.H. REV. STAT. ANN. §§ 79:3, :10-:12, :19 (Supp., 1972) (originally enacted in 1949); N.Y. CONSERV. LAW §§ 3-1101 to -1151 (McKinney 1967), *as amended* N.Y. CONSERV. LAW §§ 3-1101 to -1105, -1107 (McKinney Supp. 1972-73) (originally enacted in 1946); ORE. REV. STAT. §§ 527.610-.990 (1971) (originally enacted in 1941); VT. STAT. ANN. tit. 10, §§ 1361-65 (1958) (originally enacted in 1945); VA. CODE ANN. §§ 10-74.1 to -83.01 (1964), *as amended* VA. CODE ANN. § 10-76 (Supp. 1971) (originally enacted in 1948); WASH. REV. CODE ANN. §§ 76.08.010-.090 (1962), *as amended* WASH. REV. CODE ANN. §§ 76.08.010, .050, .060 (Supp. 1971) (originally enacted in 1945); [1943] Minn. Laws ch. 290 (repealed 1967).

34 *See, e.g.*, FLA. STAT. ANN. §§ 591.27-.34 (1962), *as amended* FLA. STAT. ANN. §§ 591.28-.30, .33, .34 (Supp. 1972-73); under § 591.28 the owner has the right, but not the duty, to designate seed trees. The Society of American Foresters reported in 1955: "To date, there have been no requests from landowners wishing to designate seed trees under this law." SAF SURVEY, *supra* note 33, at 13. *See also* VT. STAT. ANN. tit. 10, §§ 1361-65 (1958); under § 1362 all rules are explicitly made advisory, not mandatory.

ments of policy evidencing at least high ambition for truly effective forest control.[35] None dealt in detail with subjects other than cutting regulations. The last of these 13 acts was passed by New Hampshire in 1949.[36] Shortly thereafter the movement died.[37] The Forest Service shifted its attention elsewhere, and the pressure for new state legislation abated. A survey by the Society of American Foresters in 1955 found a total of only 17 states with forestry acts of any sort, with only a few actively enforced.[38] The trend toward state regulation, called "inevitable" by one leading student in 1944,[39] was dormant only a decade later; public regulation of private forestry appeared to be a dead issue.

Undoubtedly, there are a variety of reasons for the decline of any diverse and complex movement. One was the increasing conservatism of the country as a whole. The regulation movement had been closely related to the New Deal reform spirit, which abated in the 1952 Republican landslide. A second was an elaborate, energetic, and imaginative industry counterattack. By mixing patient resistance and aggressive self-promotion ultimately the industry viewpoint prevailed.

A third reason was that the nature of the problem clearly had changed by the fifties. The regulation crusade had begun as a campaign against the "timber beasts," the owners of the great baronies, chiefly in the west. However, by the fifties there was fairly general agreement that the large owners, whether due to redefined self-interest or public pressure, were doing a significantly better job of managing their timber lands. The chief threat to good forestry appeared to come from the several million small owners either unwilling or economically unable to practice good

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35 *See, e.g.*, MD. ANN. CODE art. 66c, § 388 (1970) (mentioning flood and erosion control, natural beauty, wildlife, and productivity of soil).

36 [1949] N.H. Laws, ch. 295, *as amended* N.H. REV. STAT. ANN. §§ 79:1-27 (1970), *as amended* N.H. REV. STAT. ANN. §§ 79:3, :10-12, :19 (Supp. 1972). In 1955, Nevada replaced its 1903 "seed tree act", [1903] Statutes of Nevada, ch. 93 (repealed 1955), with a more comprehensive forest practices act. NEV. REV. STAT. §§ 528.010-.090 (1971).

37 *See* CLEPPER, *supra* note 10, at 162-63.

38 *See* SAF SURVEY, *supra* note 33. Perhaps the most dramatic episode in the private counterattack was the creation of the American Tree Farm System, which is described in GREELEY II, *supra* note 13, at 158-59.

39 *See* C. KORSTIAN, FORESTRY ON PRIVATE LANDS IN THE UNITED STATES 205 (1944).

forestry.[40] When applied to small rather than large owners, conservation by rule simply did not have the same political appeal.

Finally, the much-vaunted "timber famine," a mainstay of every forest policy debate since 1877, had not occurred. Projections of demand for forest products through the years have proven, retrospectively, to be at best naive and at worst wildly inaccurate.[41] A comprehensive review of resource economics 10 years ago found evidence of price increases greater than the general increase in price level, but nothing like the supply crisis the doom-sayers had forecast.[42] A recent exhaustive study of the market for railroad ties concludes that the persistent threat of timber depletion was a "myth."[43]

II. Since 1955: A New Beginning

Forest policy did not disappear entirely from the national forum after 1955, of course. But there was an important shift in focus. The dominant concern of the past two decades has been management of public, rather than private, lands. Public lands were the subject of the two most important pieces of forest legislation of recent years, the Multiple Use-Sustained Yield Act of 1960[44] and the Wilderness Act of 1964.[45] The issue of public land management continues to be in vivid evidence today.[46] The issue of private land management has been in the shade. Lately, however, there have been signs that the picture is changing. Private forestry practices today are receiving more scrutiny than at any time in the last 20 years, with a possibility of a great deal more to come.

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40 *See* Worrell, *supra* note 10, at 170; on ownership patterns generally, see *id.* at 166-79.

41 For a critical summary of timber demand forecasts, see Duerr, *supra* note 26, at 518-39; Vaux & Zivnuska, *Forest Production Goals: A Critical Analysis*, 28 Land Economics 318 (1952).

42 H. Barnett & C. Morse, Scarcity and Growth 8, 213-15 (1963).

43 S. Olsen, The Depletion Myth (1971).

44 16 U.S.C. §§ 528-31 (1970).

45 16 U.S.C. §§ 1131-36 (1970).

46 *Hearings on the Public Policy Act of 1971 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971); D. Barney, The Last Stand (1972) (preliminary draft of Nader Study Group report on the U.S. Forest Service); U.S. Public Land Law Review Commission, One Third of the Nation's Land (1970).

This apparent resurgence stems from several recent developments. First, the threat of a timber famine may not have disappeared entirely, even if hidden from view. While supplies seem adequate for the immediate future, the Forest Service itself warns that supply problems may arise by the end of the century.[47] Moreover the supply of certain types of timber products — notably big, old sawlogs — is decreasing sharply.[48] And although the amount of forest land has increased slightly over the past generation, the land going out of production is often the most productive, while the land going into regrowth is often second-rate former farmland.[49] There is evidence that the Forest Service itself has inaccurate and excessive estimates of the amount of growing stock it has available.[50] Also, while the demand for timber products has remained fairly stable for many years, the amount of timber taken from public lands has recently increased sharply, while the relative amount taken from private lands has decreased correspondingly.[51] Such evidence has caused a leading critic of prevailing forest policy to say that "the best kept secret in this period of great concern about the declining quality of our environment is the condition of our forest lands."[52] Up to now, this controversy over supply has focused chiefly on federal lands. However, if a supply problem exists, it must be because of the inadequacy of private as well as public lands to meet foreseeable demand.

Aside from the question of timber supply, a number of environmental issues in forest policy have gained increasing attention in the last few years.[53] Questions of aesthetics and the preservation of wilderness areas in an increasingly organized society are two such issues. Problems of soil erosion, air and water quality control, and

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47 *See* U.S. Forest Service, *Timber Trends in the United States*, FOREST RESOURCE REP. No. 17, at 2, 132-33 (1965) [hereinafter cited as *Timber Trends*].

48 *Id.* at 133.

49 *Id.* at 77-78.

50 *See* J. Wikstrom & S. Hutchison, Stratification of Forest Land for Timber Management Planning on the Western National Forests, 1971, at 108 (U.S. Forest Service Research Paper) (estimating that the area of forest land suitable and available for timber production in national forests of the west has been overestimated, perhaps as much as 22 percent).

51 *See* FROME, *supra* note 16, at 76-90.

52 Robinson, *Responsible Forestry*, SIERRA CLUB BULL., Dec. 1971, at 4-7.

53 *See, e.g.*, D. BARNEY, THE LAST STAND (1972) (preliminary draft of Nader Study Group report on the U.S. Forest Service).

insecticide and pesticide use have also generated increased concern. Transcending all of these problems is the question of clearcutting, the cutting of all timber from a particular tract of land. Clearcutting is a very old technique, but lately it has become a major tool in the forester's arsenal. As a result, it has brought together public concern over conservation, water quality, soil erosion, watershed, and high yield management problems. While all of these issues have been part of forestry rhetoric since Gifford Pinchot, their ascendancy is substantially new.

At the federal level most of these issues came into focus in 1969 and 1970 during the conflict over the proposed National Timber Supply Act.[54] This act would have permitted intensified cutting on Forest Service land, to be financed through a "high-yield timber fund" supported with money from timber sales. The defeat of the act in early 1970[55] was a victory for conservationists. The scrutiny it brought to bear on the management question carried over into the following session. The Ninety-second Congress approved legislation to increase authorization for fire protection and farm forestry,[56] as well as authorizing an $865 million supplementary national reforestation fund and requiring the Secretary of Agriculture to make an annual report on the reforestation needs of federal forests.[57] Some 50 other forestry bills were introduced in the last session, of which two deserve special mention: the American Forestry Act[58] introduced by Senator Hatfield (R.-Ore.) and the Forest Lands Restoration and Protection Act of 1971[59] introduced by Senator Metcalf (D.-Mont.).

These represent the "industry" and "conservationist" approaches respectively on general questions of forest land management. Each contained provisions on a wide range of forestry topics. The Hatfield bill retained some provisions of the National Timber Supply Act[60] and called for the creation of an American Forest

54 H.R. 12025, 91st Cong., 1st Sess. (1969).

55 The vote on H.R. 12025 was 150 in favor, 229 against, and 52 not voting. 116 CONG. REC. 5117 (1970). For the debate on H.R. 12025, see *id.* at 5099-117.

56 Act of May 5, 1972, Pub. L. No. 92-288, 86 Stat. 134, 16 U.S.C.A. §§ 566, 568c, 568d (Supp. Oct. 1972).

57 Act of September 18, 1972, Pub. L. No. 92-421, 86 Stat. 673.

58 S. 350, 92d Cong., 1st Sess. (1971).

59 S. 1734, 92d Cong., 1st Sess. (1971).

60 See text at note 54 *supra*.

Policy Board to advise the executive branch on forestry issues[61] and required state plans for the use of forest resources as a precondition to grant eligibility.[62] By contrast, the Metcalf bill proposed regulation, a concept dormant for two decades. Senator Metcalf would have required the states to set timber harvesting standards, conforming to criteria set within the bill, to govern all operations on commercial forest lands.[63] A system of federal enforcement would also have been established.[64] The bill did not advance past hearings, however, and even Senator Metcalf evidenced some misgivings about it.[65]

In the states, meanwhile, a number of developments have reflected continuing and perhaps increasing interest in regulation of private forests. Most dramatic perhaps is "open-space" taxation of forest lands, also known as "green-belt" or "use-value" taxation.[66] Conventional property tax law requires that land be taxed at its "highest and best use" whether or not it is so used. Starting with Maryland in 1956,[67] a number of states have adopted special provisions allowing certain lands to be taxed at their present use in order to discourage development,[68] while others have more specialized, modified annual tax laws that may serve the same function.[69] Other acts, more closely related to traditional forest

61 S. 350, § 401, 92d Cong., 1st Sess. (1971).

62 *Id.* § 202.

63 S. 1734, § 102, 92d Cong., 1st Sess. (1971).

64 *Id.* § 104.

65 118 CONG. REC. E4236 (daily ed. Apr. 25, 1972).

66 *See generally* Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEGIS. 158 (1970).

67 Ch. 9, § 1, [1956] Laws of Maryland. Replaced by MD. CODE ANN. art. 81, § 19 (1969).

68 ARK. STAT. ANN. §§ 84-483 to -486 (Supp. 1971); CAL. REV. & TAX CODE §§ 421-29 (West 1970), *as amended* CAL. REV. & TAX CODE §§ 421, 423, 423.5, 431 (West Supp. 1972); CONN. GEN. STAT. ANN. §§ 12-96 to -107e (1972); FLA. STAT. ANN. § 193-461 (1971); HAWAII REV. STAT. § 246-12 (1968); MD. CODE ANN. art. 66c, § 411 1/2, art. 81, § 19(d) (1969); N.H. REV. STAT. ANN. § 75:1 note (Supp. 1972) (expires July 1, 1973); N.J. REV. STAT. §§ 54:4-23.1 to .23 (Supp. 1972-73); N.M. STAT. ANN. §§ 72-2-14.1 to .4 (Supp. 1971); PA. STAT. ANN. tit. 16, §§ 11941-47 (Supp. 1972-73); R.I. GEN. LAWS ANN. §§ 44-27-1 to -6 (1970); VA. CODE ANN. §§ 58-769.4 to .15:1 (Supp. 1972); WASH. REV. CODE ANN. §§ 84.34.010-.920 (Supp. 1972).

69 IND. ANN. STAT. §§ 32-301 to -319 (1969); IOWA CODE ANN. §§ 161.1-.13 (1969), 441.22 (1971); ME. REV. STAT. ANN. tit. 36, §§ 563-64 (1964), *as amended* ME. REV. STAT. ANN. tit. 36, §§ 565, 571-84 (Supp. 1972); MD. ANN. CODE art. 66c, § 411 1/2 (1970), art. 81, § 19 (1969); ORE. REV. STAT. §§ 321.605-.825 (1971) (western part of state only).

policy, permit the landowner to pay a yield tax in lieu of an annual general property tax if he keeps his land in timber.[70] A few of these yield-tax laws attach special conditions, such as requiring the landowner to undertake good forest practices by agreement[71] or to permit public access to his land for hunting and fishing.[72] Many of these laws have existed for years without much use; however, rising real estate taxes may be revitalizing some of these acts.[73]

In addition to taxation, there is also substantial state legislative activity with regard to other aspects of forestry. While no states have added new forest practices acts since 1955, at least four states — California,[74] Oregon,[75] Nevada,[76] and Massachusetts[77] — have strengthened old acts. The Massachusetts' act originally contained no penalties for failure to follow the plan prepared by the director of the Division of Forestry; but in 1952 the legislature added a token $25 fine for violations,[78] and recently it made that provision somewhat more meaningful by changing it to $25 per acre.[79] After replacing its old "seed tree"[80] act in 1955,[81] Nevada substantially rewrote its forest practices act again in 1971.[82] While Nevada has only a very small amount of commercial timber,[83] its act is note-

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70 *E.g.*, ORE. REV. STAT. §§ 321.405-.520 (1971) (eastern part of state only). E. WILLIAMS, STATE FOREST TAX LAW DIGEST (1967) (U.S. Forest Service Misc. Pub. No. 1077, with mimeo supplements) lists more than 50 special forest tax laws of one sort or another; virtually all are calculated to induce good forest practices in some sense.

71 *E.g.*, MINN. STAT. ANN. §§ 88.01, subd. 17, .47-.53 (1969); WIS. STAT. ANN. § 77.06 (1961).

72 *E.g.*, IDAHO CODE § 38-204 (1961); WIS. STAT. ANN. § 77.03 (1961).

73 New use of old tax statutes has been noted in Michigan, letter from Fred. H. Haskin, Staff Forester, Forestry Division, Department of Natural Resources, State of Michigan, to the author, June 7, 1972; in New York, letter from John W. Nellis, Associate Forester, New York State Department of Environmental Conservation, to the author, July 27, 1972; and in Wisconsin, WIS. DEP'T OF NATURAL RES., 1969-71 BIENNIAL REPORT 9 (1971).

74 CAL. PUB. RES. CODE §§ 4521-618 (West 1972).

75 ORE. REV. STAT. §§ 527.610-.990 (1971).

76 NEV. REV. STAT. §§ 528.010-.090 (1971).

77 MASS. GEN. LAWS ANN. ch. 132, §§ 40-46 (1958), *as amended* MASS. GEN. LAWS ANN. ch. 132, §§ 43, 45-46 (Supp. 1973).

78 MASS. GEN. LAWS ANN. ch. 132, § 43 (1958).

79 MASS. GEN. LAWS ANN. ch. 132, § 43 (Supp. 1973).

80 See text at note 28 *supra*.

81 Ch. 355 [1955] Stat. of Nev.

82 NEV. REV. STAT. §§ 528.010-.090 (1971) (enacted in 1971 in two parts).

83 Only 1.2 million cubic feet of timber grew in Nevada in 1952. *Timber Trends,*

worthy because it concerns soil erosion and water quality control, prohibiting both logging within 200 feet of perennial streams[84] and tractor logging on slopes steeper than 30 percent.[85] Oregon adopted the most comprehensive act in the nation in 1971,[86] after a three-year public review.[87] The new act and its supporting regulations deal with soil erosion, water quality control, and the application of chemicals to forest land[88] as well as with cutting and reforestation.

A number of amendments to California's basic forestry act,[89] have strengthened California's forestry regulations either by adding penalties and enforcement procedures or by increasing public participation in administration. In 1951, failure to comply with rules was made a ground for suspension or revocation of a cutting permit;[90] in 1957, this power of revocation was spelled out more clearly.[91] Provisions added in 1963 allowed the state to seek injunctions and to perform restorative work at the owner's expense.[92] In 1970, the State Board of Forestry was increased to eight members including a second "general public" representative;[93] the district committees were similarly increased to seven members including two "general public" representatives.[94] Provisions added in 1971 eliminated the prior requirement that proposed rules be approved by two-thirds of the affected timber ownership,[95] in-

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supra note 47, at 172-73, table 25. This was the smallest total in the nation, although a number of states had a smaller production of soft-woods alone.

84 NEV. REV. STAT. § 528.053 (1971).

85 NEV. REV. STAT. § 528.050(5) (1971).

86 ORE. REV. STAT. §§ 527.610-.990 (1971).

87 Ore. Dep't of Forestry, Material in Support of H.B. 1624, May 5, 1971.

88 *See* Statement of Purpose, ORE. REV. STAT. § 527.630 (1971); the statutory provisions giving the force of law to regulations adopted, ORE. REV. STAT. §§ 527.650, .670, .710, and .990(1) (1971); and the regulations adopted pursuant to this statutory authority, Oregon Administrative Rules 24-101 to -648 (adopted June 9, 1972—Rule No. FB 31 as found in ORE. AD. RULE BULL., July 1, 1972, at 2). For those regulations relating specifically to the use of pesticides and herbicides, see Rules 24-200 to -209.

89 Ch. 85, [1945] Cal. Stats.

90 Ch. 720, § 4, [1951] Cal. Stats.

91 Ch. 1648, § 22, [1957] Cal. Stats.

92 Ch. 2033, §§ 17-18, [1963] Cal. Stats.

93 Ch. 366, §§ 1-2, [1970] Cal. Stats.

94 Ch. 1437, §§ 5-7, [1970] Cal. Stats.

95 Ch. 752, § 1, [1971] Cal. Stats.

creased the amount the State Forester could spend to correct violations[96] and added lien provisions.[97]

California's basic forest practices law, along with all these amendments, was recently limited severely by the decision in *Bayside Timber Co. v. Board of Supervisors.*[98] The *Bayside* court, in rejecting an attack on San Mateo County's scheme of licenses and permits, held the state's conflicting regulatory scheme unconstitutional as denial of due process.[99] In effect, the court found that the state had improperly and without adequate standards delegated its lawmaking power to the regulated group itself—*i.e.*, to the timber industry. This decision set the stage for new legislation. A legislative committee commissioned the Institute of Ecology of the University of California at Davis to develop a proposal.[100] The Institute's proposed statute,[101] along with two other general forest practices acts,[102] were introduced in the California legislature in 1972, but none was adopted. Further legislative efforts this year are likely.

A number of states have also shown increased interest in regulating forest activity outside the context of forest practices acts. At least two states — Maine[103] and New Hampshire[104] — have restricted clearcutting along roadsides. New Hampshire[105] and Wisconsin[106] restrict cutting on certain waterways. Various states

96 Ch. 748, § 1, [1971] Cal. Stats.

97 *Id.* § 2.

98 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (Ct. App. 1971).

99 *Id.* at 14, 97 Cal. Rptr. at 439.

100 R. S. Loomis, director of the Institute, assembled a study group. Other members of the group, besides Loomis, were H. J. Vaux and E. C. Stone of the School of Forestry and Conservation at Berkeley; the author of this paper from the Law School at Davis; Geoffrey A. Wandesfords-Smith from the political science department and the division of environmental studies at Davis; Robert D. McCulley, retired former assistant director of the U.S. Forest Service Pacific Southwest Experiment Station, who served as a coordinator; and Robert H. Schneider, who acted as secretary and research assistant, and also participated in discussions over content. The Institute's proposal forms the basis of the one described in Part III B, *infra*.

101 Set forth in DAVIS REPORT, *supra* note 3, at ch. 2. The Institute proposal went before the legislature as A.B. 2346, but died in committee. *See* 1972 ASSEMBLY WEEKLY HISTORY 689.

102 S.B. No. 261 and S.B. No. 1326 (1972).

103 ME. REV. STAT. ANN. tit. 12, § 519 (Supp. 1972).

104 N.H. REV. STAT. ANN. § 224:44-a (Supp. 1972).

105 *Id.*

106 WIS. STAT. ANN. §§ 59.971, 144.26 (Supp. 1972).

deal with water quality control problems through pollution control agencies or fish and game laws.[107] Others have special air pollution control regulations applying to forest burning.[108]

In addition to federal and state regulation of forest practices, some cities and counties regulate logging on private lands in various ways. First, some communities seek to keep land in forest use through zoning. Wisconsin pioneered forest land zoning,[109] but other states also use it.[110] Forest zoning, like most zoning, is almost exclusively a local government responsibility.[111] A few counties in California and perhaps elsewhere also appear to have stricter forest cutting regulations than does the state.[112] This stricter county regulation is most likely to occur in localities where logging activities are highly visible to populations not themselves economically tied to the logging industry. Finally, logging in non-rural areas may present special problems since land logged is likely to be converted to other uses rather than restored to forest. For example, the location of logging roads may be particularly important since today's logging road is likely to be tomorrow's subdivision street. And the number and location of trees which remain after logging is important if they are to provide ornamentation for the suburban landscape.

As is suggested above, the recent increase in concern over regulation of forest practices has led in large part only to sporadic activity at all levels of government. What appears to be called for is a more comprehensive and new approach to the subject. It is with this purpose in mind that the proposal in the following section is offered.

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107 *See, e.g.*, WASH. DEP'T OF NATURAL RES., GUIDE TO REGULATIONS AFFECTING HARVESTING AND MARKETING FOREST PRODUCTS IN WASHINGTON 10-13 (1971).

108 *See, e.g.*, FLA. DEP'T OF POLLUTION CONTROL, RULES ch. 17-5 (1971); N.J. AIR POLLUTION CONTROL CODE ch. 2 (rev. 1971) (dealing with control of open burning).

109 *See generally* E. SOLBERG, NEW LAWS FOR NEW FORESTS 265-363 (1961).

110 *See, e.g.*, PLACER COUNTY, CAL., ORDINANCES ch. 30, § 1631 (1970).

111 For forestry zoning at the state level, see HAWAII REV. STAT. § 183-41 (Supp. 1971).

112 *See generally* A. COX & D. SOPER, LOGGING IN URBAN COUNTIES (1970); Forest Resources Study Committee, Forest Resources of San Mateo County, Mar. 1971. In New Jersey some 25 municipalities have ordinances regulating tree cutting. Letter from Gordon T. Banford, Chief, Forest Management Section of New Jersey Bureau of Forestry, to author, June 20, 1972.

III. A Proposal

A. *Rationale for Government Intervention*

The desirability of regulating forest lands for any purpose — productivity, erosion control, or wilderness protection — is ultimately a question of policy, not of law. Furthermore, even assuming that certain goals are desirable, the question of the desirability of seeking them through the framework of a public regulatory agency remains. Such an approach imposes costs both on the state in maintaining a bureaucracy and on the entrepreneurs in conforming with regulations. Whether these costs are justified depends on the ability of the private market mechanism to achieve specific forestry goals.

There are in fact indications that, due to market imperfections, state intervention is necessary if certain goals are to be achieved. In addition, the forest-management situation may in some sense be too important to be left to the market. The market imperfections involved here consist mainly of externalities, that is, costs and benefits not accounted for by the market. The ramifications of such effects have received considerable attention[113] and are mentioned here only in passing. For example, a logger who pollutes a stream normally does not bear the costs of the resultant decrease in water quality.[114] Thus, if unchecked, his self-interest will lead to higher levels of pollution than are socially desirable. Those damaged by the logger's actions could, in theory, bargain with him to cease his activities. However, the practical obstacles to such bargaining are considerable and often insurmountable.[115] A similar situation arises concerning the effect of aesthetic misuse

113 *See* Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); Sax, *Takings, Private Property, and Public Rights*, 81 Yale L.J. 149 (1971).

114 For a comprehensive summary of the role of market decisions in water quality control, see A. Kneese & B. Bower, Managing Water Quality: Economics, Technology, Institutions 75-96 (1968). *See also* J. Sax, Water Law, Planning, and Policy (1968); A. Worrell, Economics of American Forestry 343-53 (1959).

115 *See, e.g.*, Davis & Kamien, *Externalities, Information, and Collective Action*, in Joint Economic Committee, The Analysis and Evaluation of Public Expenditures, 91st Cong., 1st Sess. 67-86 (1969).

of land on nearby landowners. While no controlling theoretical framework has yet emerged, the existence of such externalities coupled with the inability of the market mechanism to correct them is normally considered to justify government intervention.

Another risk of market failure arises with respect to the issue of restocking. One traditional view, relying heavily on neo-classical economics, states that the interaction through the market of individual entrepreneurs, who are by hypothesis maximizing profit, will lead to a socially desirable level of restocking. The entrepreneur, it is argued, will not over-harvest now because he is interested not only in present profits but in preserving the long-term productivity (and thus the value) of his land. The modern history of forest policy lends some force to this view; much reforestation has been done by private entrepreneurs.[116] However, further analysis suggests that the level of reforestation may be too low. In the case of large corporate landowners, more sophisticated economic theory does not treat the firm as a monolithic entity. The interests of stockholders, directors, and managers may well diverge. For example, a manager may be more interested in present performance, measured by high profits from heavy harvests, rather than in long-term considerations. Or a situation might arise in which the investor was concerned with earning high profits now.[117] Such tendencies are undoubtedly aggravated by the long production cycles inherent in forestry. The numerous contingencies between planting and harvest increase the risk of wrong allocational guesses and thus encourage harvesting large amounts now.[118] To the extent that such market imperfections exist public intervention may again be justified.

The proposition that forestry goals may be too important to be trusted to the market is bolstered by Ciriacy-Wantrup's concept of

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116 For a comprehensive and generally sympathetic view of the achievements of industrial forestry, see CLEPPER, *supra* note 10, at 196-286.

117 For a dramatic account of a stockholder-manager controversy over cutting policies on the holdings of the Burlington Northern, see Loving, *A Railroad Merger that Worked*, FORTUNE, Aug. 1972, at 128, 180-81.

118 Worrell argues that the price system is peculiarly ill-equipped to dictate accurate allocation decisions in forestry. "The outstanding economic characteristic of forestry is the very long production period. . . . The price system has many weaknesses as a guide in making long-range decisions." A. WORRELL, ECONOMICS OF AMERICAN FORESTRY 430-31 (1958).

the "critical zone" in the management of "flow" resources such as timber.[119] Ciriacy-Wantrup identifies the zone as that point beyond which decreases of flow become economically irreversible under presently foreseeable circumstances.[120] The economic rationale for maintaining a standard above the critical zone is that "the costs of maintaining it are small in relation to the possible losses which irreversibility or depletion might entail."[121]

The above analysis appears to justify public intervention for certain purposes, despite the fact that such intervention may result in increased costs to the entrepreneurs. At the same time, it emphasizes the need to keep regulation costs to a minimum and to allow the greatest possible flexibility to the entrepreneur in choosing means to achieve specified goals.

B. *A Proposal*

Outlined below is a generalized proposal for the regulation of public and private forest practices. The proposal is based on one put forth by the Institute of Ecology at Davis.[122]

1. The Board of Forest Resources

Ultimate responsibility for management of public and private forests should rest with an appointive Board of Forest Resources. A majority of the Board should be non-industry members, and the Board's meetings should be open to the public. The Board's responsibilities should include the promulgation of regulations which are binding upon all landowners, and the examination and licensing of professional foresters.

The Board should be aided by a number of Regional Technical Advisory Committees, each having responsibility for a geographi-

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119 S. CIRIACY-WANTRUP, RESOURCE CONSERVATION 39 (3d ed. 1968). Flow resources are resources for which different units become available for use in different time intervals. Timber is such a resource, and in addition belongs to that subcategory of flow resource whose flow is affected by human action and for which there exists a critical zone.

120 *Id.* at 251-68.

121 *Id.* at 262. Worrell cautions, however, that this concept merely provides a minimum resource level; in choosing a level above this minimum, a "useful criterion . . . appears to be the stability of the environment." WORRELL, *supra* note 10, at 55.

122 The California proposal was developed by the Davis study group, *supra* note 100, and appears in DAVIS REPORT, *supra* note 3.

cal area within the state. Having a number of Regional Committees may create a cumbersome framework but it has a distinct countervailing advantage. Forestry problems vary from region to region, depending upon tree species, climate, soil conditions and the like. While technical expertise could be developed through a single bureaucracy, having Regional Committees broadens the sources of potential information and facilitates specialized handling of regional differences.

2. Standards

a. Topics Included. The standards promulgated by the Board should cover four topics — restocking, forest land amenity, soil erosion control, and water quality control.[123] There is precedent for making restocking central to a forestry statute.[124] California's previous forest practices act[125] and others like it were originally designed to promote that goal and nothing else. While these laws were designed in an era when there was less private reforestation activity than occurs today, the general state of the forest economy and the theoretical argument set forth above indicate that restocking is a goal of continuing validity. The problems of soil erosion and water quality control are vividly in evidence today. For example, on California's west coast the steep slopes, heavy rains, unstable soils, and disruptive logging techniques have conspired to raise erosion and water quality hazards.[126]

The problem of "amenity" or aesthetic regulation, presents great difficulties of definition and regulation. Public concern over

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123 These four issues have received the most attention in California. *See generally* CALIFORNIA LEGISLATIVE ASSEMBLY, COMM. ON NATURAL RESOURCES, PLANNING, AND PUBLIC WORKS, COMMITTEE REPORTS, 1967-68 pt. 3 (1968); FINAL REPORT TO THE LEGISLATURE BY THE SENATE INTERIM COMM. ON BEACH EROSION (1955); PARTIAL REPORT TO THE LEGISLATURE, 1953 REGULAR SESSION, ON FISH AND GAME BY THE SENATE INTERIM COMM. ON FISH AND GAME (1953). *See also Hearings of the Assembly Comm. on Natural Resources and Conservation, Watershed Management and Forest Practices, Eureka, Calif.* (1972); Shannon, *Forest Practices and Watershed Management in California*, AM. FORESTS, May 1967, at 7, 48-55; Calhoun, *Bulldozer Delinquents*, SIERRA CLUB BULL., July-Aug. 1966, at 15-17.

124 Legislation calculated to assure reforestation has been held constitutional. State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906 (1949); *cf.* Opinion of the Justices, 103 Me. 506, 69 A. 627 (1908).

125 See text at notes 89-97 *supra.*

126 *See also* FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, INDUSTRIAL WASTE GUIDE — LOGGING PRACTICES (1970).

clear-cutting of forest land has given particular prominence to this issue. However, a forceful argument against such regulation contends that clear-cutting is necessary and that aesthetic judgments are highly subjective. As a result any statute implementing this proposal should provide for a very modest standard requiring scenic strips under very limited circumstances and for reports on aesthetic impact in some other cases.

Even assuming that the standards chosen support desirable goals, it is by no means inevitable that they should be combined in a single forestry statute. The goal of achieving restocking comes closest to requiring some sort of specialized administration. Protecting forest land amenity, since it lies outside the scope of conventional land use controls, probably also merits special attention. Soil erosion control and water quality control, however, are in many states within the purview of other agencies[127] which arguably can do the enforcement job without special intervention.

Nevertheless, two justifications may be set forth for proposing that soil and water quality be included within the forestry framework. First, the soil and water problems associated with forest land are somewhat different from soil and water quality problems elsewhere. They have achieved a high degree of independent visibility and, more importantly, stem from common sources and require common solutions. Second, it is likely that soil and water problems arising from logging can be dealt with best in the integrated logging plans that entrepreneurs should be required to develop under this proposal.

b. Topics Excluded. A number of problems that sometimes give rise to a demand for regulation of forest land are not dealt with by the proposal in this article. Among these are air pollution (as from the burning of logging wastes) and the use of pesticides and herbicides. In some states these subject areas are regulated by other state agencies.[128]

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127 *See, e.g.*, CAL. PUB. RES. CODE §§ 9000-953 (West 1956, *as revised* Supp. 1972) (soil erosion control); CAL. WATER CODE §§ 13000-983 (West 1968, *as revised* Supp. 1972) (water quality control).

128 *See, e.g.*, CAL. AGRIC. CODE §§ 11701-792 (West 1968, *as amended* in Supp. 1972) (licensing of pesticide and herbicide appliers); CAL. AGRIC. CODE §§ 12751-994 (West 1968, *as amended* in Supp. 1972) (regulation and labeling of pesticides and herbicides); CAL. AGRIC. CODE §§ 14001-098 (West 1968, *as amended* in Supp. 1972)

A more significant exclusion is the issue of forest taxation. There is good reason to believe that distortions of forest use result from tax laws, and thus that the situation needs review.[129] Nevertheless, taxation is excluded from this proposal for two reasons. First, preparation of responsible tax legislation was not feasible in this article. Second, relevant tax legislation might well require a change either in the federal tax laws or in a state constitution, neither of which are realistic short-term goals.

Another prominent topic in forest policy not explicitly addressed by this proposal is the concept of "sustained yield."[130] This article does not propose, for example, that no trees should be cut unless replaced. Nor does it put any limit on the age of trees that can be cut. Indeed, no direct marketing controls of any sort upon timber operations are proposed. One reason for the exclusion of a "sustained yield" requirement is that the goal as stated may be too simplistic. Whether more trees or fewer trees should be brought into production is not easily answered; and given limited capital available for forestry, it may be that some land is best left idle.[131] While the force of this argument is reduced by the dubious efficacy of the market as a predictor of forest needs,[132] the issue is at least doubtful enough to caution against simplistic solutions. Thus the approach of the proposed restocking standard

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(restricting use of specific herbicides); 17 CAL. ADMIN. CODE pt. 3, ch. 1, subch. 2 (dealing with air pollution).

129 State tax problems are developed at length in DAVIS REPORT, *supra* note 3, at 96-109. On federal tax problems, see Sunley, *The Federal Tax Subsidy of the Timber Industry*, in THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS, A COMPENDIUM OF PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, 92d Cong., 2d Sess., pt. 3, at 317 (Comm. Print 1972).

130 SOCIETY OF AMERICAN FORESTERS, FORESTRY TERMINOLOGY, A GLOSSARY OF TECHNICAL TERMS USED IN FORESTRY 16 (1958) (four definitions of sustained yield). *See* Harkin, *Defining Sustained Yield Under Law: A Wisconsin Case*, 67 J. FORESTRY 154 (1969). *See also* GREELEY I, *supra* note 9, at 84.

131 *See* Behan, *Timber Mining: Accusation or Prospect?*, AMERICAN FORESTS, Nov. 1971, at 4. Barnett and Morse, discussing the possibility of retaining inventory, raise the question whether "in view of the displacement of saw timber by metal, masonry plastics, and new types of timber products . . . additional forest lands would be economical and used in the distant future even if they were of a quality equal, or superior, to present marginal supplies. With regard to the other major element in forestry, we recall very recent advances in pulping technology which are reordering the array of pulpwood supplies." H. BARNETT & C. MORSE, SCARCITY AND GROWTH 228-29 (1963).

132 See text at notes 113-21 *supra*.

should be to require restocking only where timber is cut and where the land is not converted to some other use.

Finally, this article does not propose a prohibition of clearcutting. There seems to be no consensus regarding the utility of clearcutting as a technique.[133] In the face of this uncertainty, this article rejects outright restrictions on clearcutting. Rather it is hoped that the restrictions on soil erosion and water quality control, along with the amenity standards, will minimize any hazards created by clearcutting.

3. Forestry as a Profession

Besides promulgating standards for both private and public forest management, the Board of Forest Resources also should be responsible for examining and licensing two levels of forestry practitioners, the "professional forester" and the "certified forest planner." The latter category of professionals would be the more expert and would play a crucial role in the proposal's scheme. On any land considered as "timberland," no "forest management" thereon or "conversion" thereof should be permitted without prior Board approval. Before approval may be granted, a plan devised by a certified forest planner should be submitted. If approval is granted, the Board should be able to require the owner to post a bond in appropriate cases. The planner should also report to the Board each month as well as upon completion of the project.

The role of the professional forester is the most distinctive feature of the proposal. This class of professionals should be responsible both to their employers and to the profession. These foresters should bear the central responsibility for carrying out the purposes of the regulatory scheme on a day to day basis. While the notion of institutionalizing the forester as part of a regulatory scheme is novel, the idea has many antecedents. There are of course, professional foresters already, trained at forestry schools

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133 For a comprehensive review of clearcutting, see *Hearings on Management Practices on the Public Lands Before the Subcomm. of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971); U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, SUMMARY OF THE FIVE REPORTS ON CLEARCUTTING PREPARED FOR THE PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY WITH EMPHASIS ON POLICY RECOMMENDATIONS, *reprinted at* 118 CONG. REC. S2988-94 (daily ed. March 1, 1972).

and licensed by some states.[134] The tasks assigned to foresters under this proposal are substantially similar to those already undertaken by professional foresters for private employers.

Professionalization clearly raises some problems. A professional forester under this proposal might be placed in a situation of ambiguous or divided loyalty, serving as he would both the state and the employer. Undoubtedly this situation creates a tension; but it is the kind of tension faced by any professional, including lawyers, accountants, and engineers, who must serve the goals of both their profession and their clients.

In the context of this proposal, however, there are some noteworthy advantages to using professional foresters. The first is that such foresters could provide flexibility in administration. Ultimately, the forester would be responsible to his profession for any practices he prescribes. For example, if he says that a particular technique will lead to reforestation and it does not, he would face loss of his professional status. Moreover, the use of professional foresters would economize the enforcement task of the state. It should have the effect of imposing most of the cost of the regulation in the first instance on the entrepreneur, rather than on the general taxpayer. Further it should mean the state will not have to maintain a cadre of inspectors, who would draw pay regardless of the extent of logging operations currently underway.

4. Enforcement

Besides the requirement of reports from certified forest planners, the Board should have available a number of additional means of achieving compliance. During any forestry project, the Board should be allowed to inspect the project at any time. If there is evidence of non-compliance, the Board should be able to intervene to achieve its goals. The cost of such intervention should be paid by the owner's bond or, if necessary, by a lien on the land. The Board should also have the power to seek injunctions against

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134 ALA. CODE tit. 46, §§ 150(1)-(20) (Supp. 1970); CAL. PUB. RES. CODE §§ 650-653.5 (West 1972); FLORIDA STAT. ANN. §§ 492.01-.20 (1965, *as amended* Supp. 1973); GA. CODE ANN. ch. 43.2A (Supp. 1972); MICH. COMP. LAWS ANN. §§ 338.721-.740 (1967); N.H. REV. STAT. ANN. §§ 319-B:1 to 319-B:20 (Supp. 1971). OKLA. STAT. tit. 59, §§ 1201-20 (1971); S.C. CODE ANN. §§ 29-31 to 40.15 (1962); W. VA. CODE ANN. §§ 30-19-1 to -10 (1971).

non-complying landowners. Where the Board fails to act, private citizens should be allowed to sue violators for damages or to seek to compel action by the Board. Besides conferring upon the Board general license revocation and disciplinary powers over the forestry profession, acting without a permit should be made a misdemeanor. Finally, this proposal does not pre-empt other governmental regulation. In particular, a county should be able to enact stricter regulations or petition to be the enforcing agency within its boundaries.

IV. Conclusion

The issue of governmental regulation of private forests, long dormant, appears to be attracting increasing attention due to several factors. The prospect of timber famine, for example, may not be so unlikely as has long been thought. In addition, increasing concern over environmental problems — in particular the preservation of wilderness, soil erosion control, and control of air, water, and aesthetic pollution — has influenced this concern over forest practices. The regulation issue has received particular attention in California due to a recent decision invalidating major parts of its old forest practices act. Several proposals for new acts have emerged, of which one has been presented herein as a model.

The basic features of the proposal, notably the recognition of a forestry profession and the promulgation of binding regulations by a statewide board, are applicable to any state having forest resources. The fundamental approach of the proposal is to articulate standards serving legitimate social goals, and then to require entrepreneurs to meet those standards. Once the standards are set, the entrepreneur is given maximum flexibility in achieving compliance. Emphasizing goals and de-emphasizing means should achieve compliance with maximum efficiency, free of artificial or uneconomic restraints.

THE FEDERAL BASIC EDUCATIONAL OPPORTUNITY GRANT PROGRAM: SOME ISSUES IN PROGRAM DESIGN

DAVID MUNDEL*
JAY K. WRIGHT**

Introduction

With the Education Amendments of 1972[1] Congress established the first broad-based program of direct federal financial aid to college students. The program of Basic Educational Opportunity Grants provides any undergraduate student admitted to or attending an institution of higher education with a federal grant, provided that he can demonstrate financial need.[2] The amount of the grant to which a student is entitled depends on the private resources available to him for his post-secondary education; the most important of these is a contribution from his family. Specifically, the statute provides that a student's annual entitlement while in attendance is $1400, less the "expected family contribution."[3] In the event that the funds appropriated by Congress are insufficient to pay all entitlements in a given year, the statute provides for a method of reducing entitlements of all grant recipients.[4]

The principal determinant of a student's basic grant entitle-

*Assistant Professor of Public Policy, John F. Kennedy School of Government, Harvard University.

**A.B., Dartmouth College, 1965; candidate for J.D. and M.P.P., Harvard University, 1973.

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1 Pub. L. No. 92-318, 86 Stat. 235 (codified at scattered sections of 20 U.S.C.A. (Supp. Oct. 1972)).

2 20 U.S.C.A. § 1070a (Supp. Oct. 1972). The existing federal grant program, in which funds are allotted to institutions of higher education and grants are awarded to selected students by the institution on the basis of need and educational promise, is modified and continued as a supplemental educational opportunity grant program. *Id.* §§ 1070b to b-3. This article does not deal with the supplemental grant program or with its relationship to or interaction with the basic grant program.

3 *Id.* § 1070a(a)(2)(A)(i). If a student attends college part-time, the amount of the basic grant is proportionately reduced. *Id.* § 1070a(a)(2)(A)(ii).

4 *Id.* § 1070a(b)(3)(B).

ment is the family contribution.[5] The statute directs the Commissioner of Education to establish a schedule for family contributions, taking into account the following criteria:

(1) the amount of the effective income of the student or the effective family income of the student's family;

(2) the number of dependents of the family of the student;

(3) the number of dependents of the student's family who are in attendance in a program of post-secondary education and for whom the family may be reasonably expected to contribute for their post-secondary education;

(4) the amount of the assets of the student and those of the student's family;

(5) any unusual expenses of the student or his family, such as unusual medical expenses, and those which may arise from a catastrophe.[6]

In drafting the legislation, congressional committees considered the methods used by two private organizations which serve as advisors to colleges and universities on the financial needs of their students — the American College Testing Program and the College Scholarship Service.[7] These organizations receive reports from the parents of financial aid applicants indicating family financial circumstances. From the information reported, the advisors estimate the family's capacity to pay for the education of an aid applicant and then recommend a family contribution to their subscriber institutions. There is some evidence that the Senate Labor and Public Welfare Committee considered devising a statutory schedule relating family contributions to family financial resources modeled on the schedules used by the private organizations.[8] Ultimately, however, Congress left the task of schedule design to the Commissioner of Education.

The purpose of this article is to illuminate the Commissioner's task of schedule design. Evaluation of a contribution schedule can proceed only after a definition of program objectives. Viewed in

5 *Id.* § 1070a(a)(3)(B)(i).
6 *Id.* § 1070a(a)(3)(B)(ii).
7 S. REP. No. 346, 92d Cong., 1st Sess. 33-36 (1971).
8 *Id.* at 35.

light of these objectives, certain aspects of family contribution schedules presently used to allocate private and public institutional aid are inappropriate. After defining the objectives of the basic grant program, this article considers the inadequacies of the schedules used by private organizations, in particular, the schedule used by the College Scholarship Service.[9] Finally, suggestions for further study on the design of a contribution schedule are offered.

I. Objectives to be Met in the Design of a Family Contribution Schedule for the BEOG Program

Three objectives should be sought in the design of a family contribution schedule: achieving horizontal and vertical equity; stimulating the higher-education enrollment of students from low- and moderate-income families; and minimizing administrative costs.

A. *Horizontal and Vertical Equity*

The family characteristics which the Commissioner of Education must consider in determining family contributions — the effective income of student and family, the amount of student and family assets, the number of dependents, the existence of any unusual expenses, and the post-secondary education expenses of other children in the family[10] — suggest that the family contribution schedule is to be a scheme which will classify families according to ability to pay for higher education. The objectives of attaining horizontal and vertical equity are familiar notions in any scheme which seeks to allocate burdens or benefits among persons according to their financial circumstances (*e.g.*, federal income taxation).

The principle of horizontal equity prescribes that equals should be treated equally — families in similar financial circumstances should be treated similarly — by a family contribution schedule. Issues of horizontal equity arise in the attempt to define and measure the family attributes relevant to the family's ability to

9 The College Scholarship Service is the largest of the private organizations which advise colleges on financial aid programs.

10 20 U.S.C.A. § 1070a(a)(3)(B)(ii) (Supp. Oct. 1972).

pay. Stating the principle does not, of course, make its application easy, for the question of whether two families are in similar financial circumstances is frequently troublesome. Nevertheless, in pursuit of the principle at least two questions about a family contribution schedule should be asked: is each rule which discriminates among families justified by some difference in their ability to pay; and does the entire scheme ignore any important differentiating attributes?

There is no comparable shorthand statement of a vertical equity principle. The command of vertical equity is not equality, but fairness. It is accepted that different people will be treated differently, and the issue is whether the difference in treatment is fair. Because it is a rather nebulous concept, "fairness" is of limited use in deciding the particular characteristics of a contribution schedule. It may sometimes be possible to identify a particular characteristic as unfair; it is often more difficult to say which alternative is the fairer, especially if the alternatives are not offensive. Fairness will, at best, dictate some spectrum of characteristics, not a particular characteristic to the exclusion of all others. Since there is no readily accepted operational statement of the principle of vertical equity which can be applied conveniently to a family contribution schedule, this analysis presumes that the principle of vertical equity embodies a notion of progressivity — families having a greater "ability" to contribute should contribute a greater proportion of that "ability."

B. *Stimulating College Enrollment of Students from Low and Moderate Income Families*

This objective is inferred from the character of the program itself and from the legislative history of the enacting statute. A traditional purpose of public aid to students has been to channel funds to students from families having extremely limited resources — students who, without assistance, would decide that college was beyond their reach and who could not easily be reached by institutional aid alone.[11]

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11 *See, e.g.*, H.R. REP. No. 554, 92d Cong., 1st Sess. 21-22 (1971): "All student aid programs are available for the most needy who can meet the 'but for' requirement — but for this help they could not go to college."

Moreover, it is clear that stimulating enrollment of needy students was an important purpose of this particular student aid program. The Senate Labor and Public Welfare Committee, for example, began its discussion of the student aid provisions of the bill by expressing concern for the much lower college enrollment rate among students from low-income families than among students from families with greater financial means.[12] Affirming a commitment to equal educational opportunity, the Committee stressed the importance of access to education for equal opportunity.[13]

The House Committee on Education, while focusing more on the mechanics of operating student aid programs, including the basic grant program, did not quarrel with the objective of the program as it appeared in the Senate bill.[14] While both Houses of Congress rejected particular statutory provisions which would arguably have gone further than the basic grant program as enacted, in the direction of favoring lower income students,[15] the principle of equal educational opportunity remains.

It is also possible to regard the Education Amendments of 1972 as intended to encourage enrollment stimulation generally, with some, but not exclusive, emphasis on low-income students.[16] It is less clear that general enrollment stimulation should be viewed as a specific objective of the basic grant program itself. The same considerations in designing a schedule emerge from either interpretation.[17]

C. *Administrative Cost*

Administrative costs cannot be ignored because attaining the other objectives may be expensive, and relentless pursuit of one objective will eventually divert funds needed for pursuing others.

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12 S. REP. No. 346, 92d Cong., 1st Sess. 30 (1971).

13 "[T]his Committee believes that equality of opportunity for participation in our society is severely limited for every student who does not have the financial resources to enable him or her to obtain a post-secondary education." *Id.*

14 *See generally* H.R. REP. No. 554, 92d Cong., 1st Sess. 15-34 (1971).

15 *See, e.g., id.* at 243 (remarks of Representative Quie, R.-Minn., insisting that where appropriations are inadequate, those students with greater need be helped first).

16 *See, e.g.*, S. REP. No. 346, 92d Cong., 1st Sess. 24 (1971).

17 See Part V *infra*.

Achievement of perfect horizontal equity, for example, might require the acquisition of a vast amount of detailed information about families' wealth. The administrative effort required to solicit, verify, and assemble into usable form such information could require a vastly disproportionate share of the basic grant budget. Therefore, the possibility of some inequity must be tolerated so as not to divert substantial funds from basic grant budget.

Administrative costs include all resources expended in operating a family contribution schedule once it has been designed. These can be categorized as: the cost of obtaining information about family attributes; the cost of valuing attributes and measuring ability to pay; the cost of determining family contribution; and the cost of communicating a basic grant award to a recipient. Some, but not all, of these costs may involve expenditures by government. The cost of determining family contributions, for example, may include data processing and clerical services necessary to tabulate valuations of family attributes and apply contribution rates. The government can purchase these services, either by assigning government employees or contracting with private agencies to provide them, or it can create a system in which these expenses are borne by parents, students, and institutions. Information about family attributes will be reported largely by families themselves under almost any system. Although families probably will not be compensated for performing this function, and thus no appropriated funds diverted, the effort required for self-reporting should nevertheless be considered an operating cost of the contribution schedule. A cumbersome procedure for self-reporting may discourage potential basic grant applicants and hinder attainment of the program goal of encouraging enrollment of needy students in post-secondary education.

Administrative costs can be dealt with only generally here, since no effort has been made to collect information necessary to predict administrative costs of particular contribution schedule characteristics. Even if such information were available, it would be difficult to specify trade-offs between reducing administrative costs and the pursuit of other objectives, or even to ascertain a level of administrative costs which might be considered reason-

able.[18] An attempt has been made to be sensitive to administrative costs when comparing different characteristics of a family contribution schedule, for example, where one characteristic might lead to higher administrative cost than another. But the amount of difference cannot be predicted with much specificity.

II. The College Scholarship Service Family Contribution Schedule: A Description

In the College Scholarship Service (CSS) family contribution schedule,[19] the total family contribution consists of a contribution from the applicant himself and a contribution from his parents. The applicant's contribution is based upon his own assets and summer earnings. The applicant's contribution tends to be a less important determinant of the family contribution than the parents' contribution, the one with which this article will deal primarily.

The parents' contribution is based largely on a construct called adjusted effective income which, when viewed in light of the family size, is the expression of ability to pay. Adjusted effective income, in turn, has two components — income and net worth — which must be considered separately. The income component includes net income from all sources,[20] from which certain deductions are allowed. These deductions include estimated federal and state income taxes;[21] a housekeeping allowance, allowed to two-parent families in which the mother works;[22] medical and

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18 Reasonableness would appear to depend, in part, upon whether taxpayers, basic grant recipients, or their families bear the burden of administrative costs, as well as on the absolute level of such expenses.

19 The description of CSS procedures has been taken from College Scholarship Service, Manual for Financial Aid Officers (1970 ed., 1971 rev.) [hereinafter cited as CSS Manual].

20 *Id.* at 5-3.

21 *Id.*

22 *Id.* Technically, the housekeeping allowance is set off against the mother's income. The allowance is 50 percent of the first $2000 of her income and 25 percent thereafter, to an absolute ceiling of $1500. A proposed revision would make the allowance a working spouse's allowance, computing it from and setting it off against the lesser of the two parents' incomes. *See* J. Bowman, Measuring the Financial Strength of Family Resources: Suggested Revisions in CSS Procedures for 1972-73, at 18-19, June 1972 [hereinafter cited as Suggested Revisions in CSS Procedures].

dental expenses;[23] and certain "emergency" expenses.[24] The family net worth is the sum of certain farm or business equity;[25] equity in other real estate, including family residence;[26] and certain other assets, exclusive of consumer durables.[27] From this sum, two further deductions are permitted — personal debt (except that attributable to consumer durables)[28] and a retirement allowance designed to shelter some of the parental assets for use during their retirement years.[29] These subtractions yield the discretionary net worth to which a conversion rate[30] is then applied to produce an annual income supplement. The particular conversion coefficient used is based on an actuarial estimate of the remaining life of the head of the household and the expected growth of net worth during that period.[31] The income supplement obtained from net worth is then combined with the income component to produce adjusted effective income.

Once the adjusted effective income of the applicant's parents has been calculated, the amount of the expected parental contribution is determined from a schedule promulgated by CSS.[32] The contribution depends both upon adjusted effective income and family size.[33] Table I shows an extract from the CSS schedule for a two child family.

It is convenient to regard the parents' contribution as a "tax" on adjusted effective income. The contribution rate is the rate at which dollars of effective income are "taxed" as parents' contributions. Of particular interest is the marginal rate at specific levels of effective income — the proportion of an extra dollar of adjusted effective income which will be "assessed" as additional contribution. Table I reveals the amount by which parental contribution

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23 Medical and dental deductions include that portion of these total expenses that exceeds five percent of before-tax income. CSS MANUAL, *supra* note 19, at 5-3.

24 *Id.*

25 *Id.* at 5-7.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 5-7 to -8.

30 *Id.* at 5-8.

31 *Id.*

32 *See* CSS MANUAL, *supra* note 19, at app. B.

33 *Id.*

TABLE I
Parents' Contribution Schedule

Two Dependent Children			
(1) Adjusted Effective Income	(2) Parents' Contribution	(3) Additional Contribution From $250 Increase In Effective Income	Marginal Contribution Rate
5,000	—120	70	28%
6,000	140	70	28
7,000	410	70	28
8,000	680	70	28
9,000	950	70	28
10,000	1,220	70	28
11,000	1,480	70	28
12,000	1,800	90	36
13,000	2,180	100	40
14,000	2,630	110	44
15,000	3,150	130	52
20,000	5,900	130	52
25,000	8,650	140	56

Source: CSS MANUAL, App. B.

increases because of additions to the family's adjusted effective income, as well as the marginal rates. The contribution rates can be seen to be moderately progressive, the marginal rate rising from 28 to 56 percent.

The relationship between parents' contribution and effective income is displayed graphically in Figure I for four different family sizes. The graphic presentation conveniently illustrates two characteristics of the CSS contribution schedules. First, the slope of the curve is the graphic representation of the marginal contribution rates, such as those shown in Table I. The progressivity of the rate is shown by the increasing steepness of the curve as income rises.[34] Second, the vertical distance between the curves at a particular point along the adjusted effective income axis represents the difference in parents' contribution for families having the same adjusted effective income but different size. It is convenient to denote this difference as "savings" which accrues to a family of fixed income with an additional child. Figure I shows that the "savings" in parental contribution becomes progressively smaller as family size increases.

34 A straight line would indicate a strict proportional contribution rate.

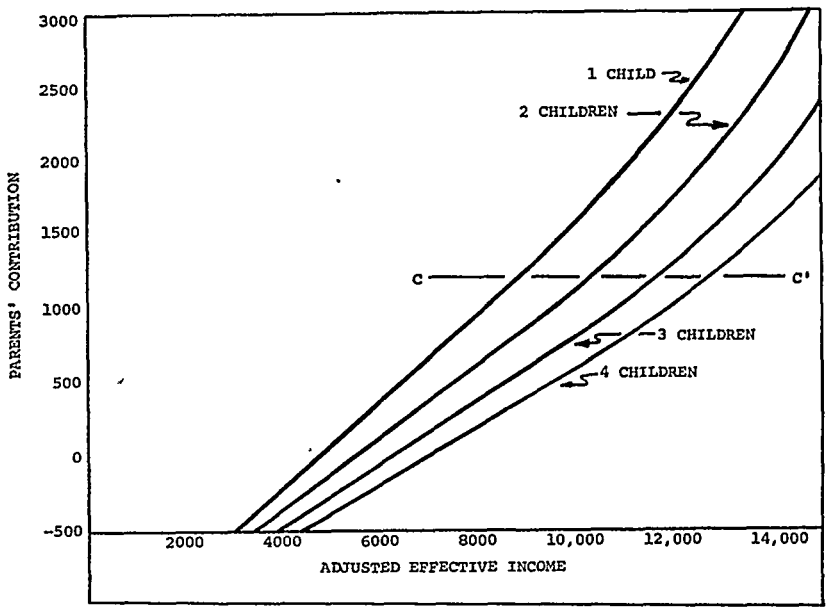

FIGURE I. COLLEGE SCHOLARSHIP SERVICE PARENTAL CONTRIBUTION CURVES

Also one may compare the savings due to additional children at different income levels, by noting the vertical distance between the same two curves at different points along the adjusted effective income axis. Because the curves diverge as effective income increases, the savings attributable to corresponding increases in family size will increase as adjusted effective income rises. For example, at an adjusted effective income of $8000, the difference in parental contribution for a one-child and two-child families is $360. At an effective income of $12,000, however, the corresponding difference in parental contribution is $550 ($2350 for the one-child and $1800 for the two-child family). Thus, a second child saves a family with an effective income of $12,000 nearly $200 more than it saves a family with an adjusted effective income of $8000.[35]

35 One other feature of the calculation of parents' contribution should be noted. The contributions which appear in Table I and Figure I are based on the assumption that, regardless of the number of children in the family, only one child attends college in a given year. Therefore, the contribution given is the contribution for the education of that single child. While the CSS procedures do deal with this complication (*see* CSS MANUAL, *supra* note 19, at 5-13 to -14), as should the basic grant schedule, a discussion of this additional feature would only detract from the basic points to be made herein, and is therefore omitted.

This description of the CSS schedule should suffice to allow analyzing the schedule in light of the statutory objectives of the basic grant program. The purpose of this analysis is not to question the appropriateness of the CSS schedule for its present use, but rather to illustrate how specific procedures of an actual contribution schedule may be examined in terms of broad objectives, and to suggest, in light of these objectives, directions which the design of a contribution schedule for the basic grant program might take.

III. Horizontal Equity Issues

Horizontal equity issues arise in two places in a family contribution schedule. First, rules for measuring family resources must be designed so that families having identical ability to pay are in fact determined to have equal resources, or as nearly equal as administrative capabilities will allow. Second, contribution curves which translate these resources into family contributions must assess families with the same resources equally.

A. *Measurement of Family Resources*

1. Exclusion of Farm or Business Equity from Net Worth

When a family farm or business is the principal source of family income, only a portion of the equity is included in the CSS calculation of the parent's net worth.[36] The exclusion of some farm and business equity clearly creates a serious horizontal inequity in favor of families who hold such assets. Families holding wealth in the form of savings accounts, stocks, or real estate are not similarly favored.

The justification given for the exclusion of farm and business equity while including other equity is to "avoid endangering the income-producing ability" of the farm or business.[37] It is unclear why these interests are more worthy of protection than other income-producing assets, such as stocks or bank accounts. Perhaps the explanation is that farm or business assets are viewed as more

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36 The proportion included increases with the amount of equity from 40 percent of the first $20,000 to 70 percent on the excess over $100,000. *Id.* at 5-7.

37 *Id.*

essential to the family's economic welfare than other assets. This concern really goes to the burden which should be placed on assets, not to which assets should be included in the measurement of family resources. The correct response is to include all assets, and adjust contribution rates to make certain that income-producing assets are not too heavily burdened.

2. Exclusion of Consumer Durables

In calculating net worth of the parents, the CSS schedule ignores consumer durables,[38] thus favoring families which hold assets in this form. The justification for the exclusion is presumably that the cost of reporting and valuing consumer durables and of having to verify the parents' reports would add to the administrative expenses.

In the context of the basic grant program, administrative cost does appear to make the inclusion of all consumer durables unattractive. But the inclusion of the family's equity in a few kinds — such as boats or automobiles, which could be valued fairly accurately — might be feasible.[39] Of course, the inclusion of these items would not eliminate entirely the problem of horizontal inequity; those families holding their wealth in the form of excluded consumer durables would still be favored.

3. Treatment of Personal Debt

The different ways in which personal debt and mortgage debt enter the calculation of parents' net worth in the CSS schedule would pose some interesting problems of horizontal equity if kept in the basic grant schedule. Under present CSS practice, the market value of each piece of real estate and each farm and business asset is reduced by any mortgage which it secures to yield the owner's equity in each asset.[40] Personal debt, however, is scrutinized separately, since it is often not secured by a particular physical asset. The result is that while the use of proceeds from

38 *Id.*

39 Any debt attributable to consumer durables included in the calculation of net worth should be deducted so that only the family's net ownership in a particular good is included.

40 CSS MANUAL, *supra* note 19, at 5-7.

a personal note may be examined, the use of funds obtained from a mortgage on real estate, farm, or business assets are not.

An example will make clear the problem posed by the difference in treatment. Suppose two families with identical incomes and total net worth decide to buy a new automobile. Family *A* finances the automobile by increasing the mortgage on the family house, and family *B* takes a bank loan with the new automobile as collateral. After the purchase of the new automobile, the families still have identical net worth. In reviewing family *B*'s financial statement, CSS will not deduct the debt to the bank for the new automobile, for CSS ignores debt incurred to purchase consumer durables.[41] Family *A*'s debt to purchase the automobile will be deducted, however, because the family reports to CSS only the equity in its house, and CSS does not inquire into use of the proceeds.[42]

In the illustration, horizontal equity could be achieved if, in determining net worth, both the automobile and related debt were included. But since some consumer durables will invariably be ignored in the calculation of net worth, the possibility of some horizontal inequity remains, unless personal debt for any purpose is allowed, or unless families are required to document the use of funds obtained from mortgages so that the same exclusionary rules applied to personal debt can be applied to mortgage debt. The latter suggestion, however, would require such enormous administrative cost that allowing a deduction for all personal debt seems to be the only feasible method of achieving horizontal equity.

A liberal allowance for personal debt might be viewed as creating an incentive for parents to purchase "luxury" goods and services rather than to save for their children's education. But a financial aid system is not well-suited to dealing with such alleged incentive effects. Because the task of the system is measurement of the financial resources presently available to pay for the child's education, the parents' prudence, or lack of it, in spending past income is irrelevant.

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41 *Id.* This is correct because CSS excludes the value of consumer durables from assets recorded in net worth.

42 *See id.* at 5-7, -13. In a sense the debt is deducted twice — once by excluding the car, once by reducing the value of the house.

4. Retirement Allowance

A retirement allowance is deducted from the parents' net worth, if the net worth is greater than zero, to determine discretionary net worth.[43] In the event that the retirement allowance exceeds net worth, discretionary net worth is considered to be zero, and no portion of the family's assets is added to adjusted effective income. No reduction of adjusted effective income is permitted, however, in the event retirement allowance exceeds net worth. This practice treats alike families who are in different financial circumstances — those who have sufficient net worth to cover their retirement allowances and those who do not.

If retirement income is a justifiable prior claim on the parents' savings, and if the retirement allowance actually reflects some basic retirement need, then families without sufficient present net worth to cover a retirement allowance should be allowed to reflect this additional need to save for retirement from present income. One way to accomplish such treatment would be to allow a negative discretionary net worth deduction. CSS does allow as a deduction against effective income one-third of any negative net worth before retirement allowance.[44] Expanding the deduction to include consideration of retirement allowance appears justifiable.

Expansion of the deduction would entail an additional administrative cost in determining how the allowance should be calculated, modifying the need-analysis system and adding a computational step. Such administrative costs are usually slight, however, and are outweighed by the horizontal inequity under the existing system.

5. Conversion of Discretionary Net Worth to Income Supplement

In the CSS schedule, discretionary net worth, that part of net worth which remains after the retirement allowance is deducted, is converted to an income supplement according to a schedule of rates discussed earlier.[45] The present conversion rates depend

43 *Id.* at 5-7 to -8.

44 *Id.* at 5-3.

45 See text at notes 25-31 *supra.*

upon age and sex of the household head.[46] It is assumed that parents will draw upon accumulated assets every year for the remainder of their lives. How much they will draw in a given year depends upon expectations about savings in future years. The CSS rates assume that older parents expect to save less in future years and, therefore, are assumed to be able to draw a smaller percentage of accumulated assets in any one year.[47]

The horizontal equity issue here is whether the discrimination among families identical in all respects except the age of the household head is justified by a difference in present ability to pay, when a retirement allowance against assets has already been deducted. Presumably, the retirement allowance has taken care of their need to save for retirement. A further age discrimination seems unwarranted, unless the retirement allowance is somehow inadequate to fulfill its purpose. If that is the case, revising the retirement allowance would appear a simpler and more straightforward method of correction.[48] Administrative cost would be decreased by such a change because eliminating the age discrimination in asset conversion would simplify computation.

6. Income in Kind

It is not clear how thoroughly income in kind is investigated or considered in the CSS parental contribution schedule. The *CSS Manual* alerts financial aid officers to the fact that farm families, military personnel, clergymen, some private school teachers, and

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46 CSS MANUAL, *supra* note 19, at 5-8. The behavioral norms upon which the CSS conversion rate schedule is based are described as follows:

> Under this approach, the discretionary net worth is assumed to be converted into an annual income flow by determining the amount it could provide when based upon the actuarial estimate of the remaining life-years of the head of the household and its expected growth because of the years of working life remaining for the household head. In other words, because wealth has been accumulated in past periods for use at some time in the future, some portion of it could be assumed to be available for that use in each of the expected remaining future years.

Suggested Revisions in CSS Procedures, *supra* note 22, at 13.

47 *See* Suggested Revisions in CSS Procedures, *supra* note 22, at 13.

48 The CSS is considering a progressive rate system of this type at the present time. *See* Suggested Revisions in CSS Procedures, *supra* note 22, at 13-16. The same issue is presented, however, in a progressive schedule, so long as a different set of rates applies to different age groups.

others may receive certain fringe benefits which reduce their need to expend money income on basic necessities.[49] Failure to include income in kind clearly results in favoring those families which receive their income in this form.

Including all income in kind would probably raise administrative problems that are sufficient justification for ignoring most of this income. Reporting of income in kind would not be reliable, and difficult questions of valuation could be raised. How, for example, should health benefits be valued? Would value depend upon the employer's per capita cost of providing the benefit or on how often the family used the facility, or both? Even if rules for valuation were established, the valuations in individual cases would be troublesome. If self-reported valuations could not be policed,[50] then the inaccuracies in parental reporting could generate new inequities among families. The requirement of submitting a copy of a federal income tax return might capture some forms of income in kind, but any additional policing appears too costly.

7. Applicant's Summer Earnings

Financial aid applicants are deemed to contribute money saved from summer employment toward their college education. The amount of the imputed savings depends upon the applicant's sex and the number of years of college already completed. It is difficult to know how closely college financial aid officers follow the CSS schedule for imputing these savings, since the *CSS Manual* so clearly invites departure based on individual financial aid officers' judgments based on their personal contact with the applicant. The *CSS Manual,* however, urges departure based on the applicant's ability to earn.[51] A fairer basis for discriminating among applicants, however, might be on the basis of their ability to save.

The amount which a college-age youth can save from summer

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49 CSS MANUAL, *supra* note 19, at 5-15.

50 It is true that "fringe benefits" are taxed as income in many cases, *see, e.g.,* Gordon S. Dole, 43 T.C. 697, *aff'd* 351 F.2d 308 (1st Cir. 1965), and, therefore, could arguably be included here. The Internal Revenue Code, however, provides enforcement powers such as criminal sanctions which are not provided in the basic grant statute. *See* INT. REV. CODE OF 1954, §§ 7201 *et seq.*

51 *See* CSS MANUAL, *supra* note 19, at 5-14.

employment could depend substantially upon the financial circumstances of the entire family. When the parents have little income of their own, support for other members of the family may claim a substantial part of the applicant's earnings. Applicants who find that family support is a stronger claim upon income than savings for college are different from other applicants, but all are treated alike by the imputed savings schedule.

Making adjustments in the basic grant system based on personal contact and involving broad discretion is undesirable. More satisfactory would be a progressive schedule which makes an applicant's imputed savings a function of the financial circumstances of his parents. The investigation required to establish such a schedule would, of course, entail serious administrative cost. There would be a considerable fixed cost in determining precisely what variables can predict accurately the earnings of an applicant. Applying a more refined savings schedule to each applicant might substantially raise operating costs. Furthermore, investigation might reveal no satisfactory system for predicting earnings and imputed savings. Accurate predictive variables might not be discovered, or once discovered they might be too costly to measure and report.

Another possibility would be to ignore entirely the anticipated summer earnings of the applicant. Summer earnings which were retained by the applicant would show up eventually as an accretion to his assets. This procedure would remove some of the arbitrariness of the present schedule. There is, of course, the risk that such a practice would create an incentive for students to spend summer earnings rather than save to apply them to educational expenses. But incentive effects such as these are somewhat speculative and depend upon unascertainable individual expectations of whether financial aid will be forthcoming if summer earnings are spent rather than saved.

B. *The Parents' Contribution Curve*

The parents' contribution curves (Figure I) show that negative contributions are assessed for families at low levels of income. This negative contribution feature is not compatible with statutory language authorizing the basic grant program. A negative

contribution applied to the formula "$1,400 minus family contribution"[52] would yield a grant greater than $1400, but it is clear that Congress intended $1400 to be the maximum grant.

One way of modifying the CSS curves to achieve the mandated result would be to make all negative contributions zero. At first glance, this modification might appear to be the only reasonable and fair one,[53] but it would compromise the theoretical ideal of horizontal equity. A zero contribution would be assessed to families over a wide range of income — a range of nearly $6000 for a two-child family, for example. Families whose financial resources differ substantially would be treated alike. It could be argued, however, that this is not really a distressing inequity because it will result only in increasing the grants awarded to some "less deserving" applicants. While unequals would be thus treated equally, the families with the lesser financial resources would not be hurt in any way. This theoretical argument would be true were it not for the system of reducing basic grants if the program is not funded sufficiently.[54]

Correction of this inequity would require restructuring the schedule in the lower region, so as to assess a positive contribution at every level of parental income. Horizontal equity suggests that some contribution, even at low income levels, is justified. Further justification may be found in actual parental behavior. Parents even at low-income levels contribute to the support of their children before they reach college-attendance age, and thus some continuing contribution when children attend college seems warranted.

IV. Vertical Equity Issues

The most significant equity issues which arise in the analysis of a basic grant schedule involve the design of parental contribution curves as well as the conversion of parental net worth to an income supplement. Those features which deal with the resources

52 20 U.S.C.A. § 1070a(a)(2)(A)(i) (Supp. Oct. 1972).

53 *See, e.g.*, R. Hartman, Higher Education Subsidies: An Analysis of Selected Programs in Current Legislation, 1972, at 471 (The Brookings Institution reprint no. 247).

54 20 U.S.C.A. § 1070a(b)(3)(B) (Supp. Oct. 1972).

of students themselves are of comparatively minor significance since student resources are likely to be much less variable than parental resources and because parental contributions tend to dwarf student contributions.

A. *Parental Contribution Curves*

Because the maximum basic grant by statute is $1400[55] and because the statute dictates that entitlements of less than $200 will not be paid,[56] only the lower parts of the CSS family contribution curves (Figure I), that is, the parts below a family contribution of $1200, are relevant in the basic grant program. The $1200 contribution level is indicated by the line labelled CC′ in Figure I.[57]

The philosophy which seems to be implicit in the contribution rate structure of the CSS curves is that families should not be forced to change their living standard "too much" in order to provide their children with a college education, even at incomes above moderate income levels. The low marginal rates, in effect, tell parents that they can choose college education for their children without foregoing the use of income for other goods and services which are not "necessities." Whatever the propriety of such an approach in a private sector service, there is no reason in principle why it should be kept in the design of a public sector contribution schedule. Higher contribution rates from income, especially above "moderate" levels, ought to be considered. Furthermore, fixing the Bureau of Labor Statistics intermediate budget as the level above which progressivity begins would imply that families at that income level should be able to provide a college education for their children without substantially altering the pattern of other consumption. It is not at all clear that Congress intended this result or committed sufficient public resources for its achievement.

Two approaches to low-income contribution assessment seem

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55 *Id.* § 1070a(a)(2)(A)(i).

56 *Id.* § 1070a(a)(2)(B)(iii).

57 A student whose parents' contribution was less than $1200 may, under CSS type procedures, still receive no grant because of his own contribution. See text at note 19 *supra*. In the ensuing discussion, the student's contribution is assumed to be negligible.

consistent with the objective of vertical equity. First, contributions might be based on Bureau of Labor Statistics low standard-of-living budgets, reflecting what parents contribute for support of children before they attend college. Alternatively, contributions might be based upon reports of current expenditures by low-income parents on their college-going children. With either approach adjustments might be in order to permit more efficient enrollment stimulation.[58]

B. *Conversion of Assets to Effective Income*

Rates for converting discretionary net worth to income depend upon the number of parents in the household and upon the age of the primary working parent.[59] For a male head of household, for example, the conversion rates range from 7 to 12 percent. Because the marginal contribution rates from total income vary from 28 to 56 percent (see Table I), for people at the lower end of the income ladder (those families needing basic grant support), the maximum burden on discretionary net worth is likely to be only about four percent. It should, therefore, be apparent that this plan will not excessively burden accumulated wealth or force liquidation of assets in order to satisfy the little burden it does impose. Families are not asked to disturb their accumulated wealth even though they elect to provide college education for their children.[60]

It is important to remember that the conversion rates described here are applied not to entire net worth but to discretionary net worth — the amount which remains after deduction of the retirement allowance. The burden on net worth cannot be fully assessed without knowing to what extent families are sheltered by the retirement allowances. In this regard, the CSS retirement allowance for a 47-year-old male head of household is $10,000.[61] This figure exceeds mean net worth of families with incomes of $10,000 or less, reported in the 1967 Survey of Economic Op-

58 See Part V *infra*.

59 *See* CSS MANUAL, *supra* note 19, at 5-8.

60 It should be noted that CSS is presently considering adopting a progressive rate schedule. *See* Suggested Revisions in CSS Procedures, *supra* note 22, at 13-16. These changes would lower conversion rates below $20,000 of discretionary net worth and raise rates above $20,000.

61 CSS MANUAL, *supra* note 19, at 5-8.

portunity.[62] If the net worth of families in each income category tended to cluster near the mean value, it could be said with some assurance that the CSS retirement allowances have the effect of exempting the net worth of most families with annual incomes less than $10,000.[63] But some families with low incomes may have sufficient assets to generate an income supplement in the CSS contribution system, even though their mean net worth is below the minimum retirement allowance used in the CSS need analysis.

In the CSS system, the value of the retirement allowance (the purchase price of an annuity) is treated as a claim upon net assets which must be satisfied before any of the assets may be burdened to finance a college education for the children.[64] One suspects that families do not, in fact, behave this way, and that the portion of their net assets they regard as available for discretionary expenses is not so small as the CSS need analysis assumes. Instead, if parents had expectations about saving from future income to provide for their retirement, they would probably not feel compelled to safeguard as much of their current net assets as the CSS retirement allowances would suggest.

Conceivably, one could design retirement allowances more consistent with family behavior for use with the basic grant program. The allowances, which would be smaller than those now used by CSS, would be based upon assumptions about family income expectations, saving rates, and propensities to liquidate or borrow against assets for discretionary purchases. It is difficult to know, however, what assumptions would be appropriate. Issues of fairness are raised when assumptions are made about parents' income expectations, if future income is more uncertain than the assumptions reflect.

Rather than seeking a new rationale for the retirement allowances, therefore, one might preserve the rationale of the present retirement allowances while increasing the burden placed on assets. Retirement needs, for example, might be calculated on the

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62 Mean net worth was calculated from data obtained in 1967 Survey of Economic Opportunity, available from The Brookings Institution, Washington, D.C. A computer print-out is on file at the John F. Kennedy School of Government, Harvard University.

63 It was not practical to investigate the distribution of family net worth within each income class with the data from the Survey of Economic Opportunity.

64 CSS MANUAL, *supra* note 19, at 5-7 to -8.

basis of the Bureau of Labor Statistics low budget for retired persons rather than on the intermediate budget. This procedure would produce lower retirement allowances than those presently used by CSS. Adoption of allowances based on the lower budget level would not suggest that families do not deserve a higher retirement income. The low-budget standard would simply acknowledge that families able to retire at the intermediate budget standard of living have greater ability to pay for their children's education and, therefore, have less need for government subsidy. Lower retirement allowances would introduce greater progressivity in the treatment of assets among families with annual incomes of $10,000 or less, because current CSS procedures treat alike all families whose net assets are less than the retirement allowance.

With respect to wealth not sheltered by retirement allowances, a contribution schedule designed for the basic grant program could depart substantially from present CSS treatment. There is no need to assume, as the CSS system now does, that a family's accumulated wealth must inevitably be spread over the remaining expected life of the parents and cannot be burdened significantly in order to pay for college. A family might, for example, be deemed able to borrow against a substantial part of its discretionary net worth, say 80 percent, and contribute this entire sum for the higher education of their children, under provisions for spreading the sum over each anticipated child-year of higher education.

In summary, the present treatment of assets by the CSS system cannot be said to be unfair. However, modifications such as those proposed which make the system somewhat less generous seem equally fair. Thus, while fairness may not compel a departure from the CSS need analysis system, neither should fairness alone preclude any departure which is indicated for other reasons.

V. Stimulating the Enrollment of Low and Moderate Income Students

Another objective of the basic grant program is to stimulate enrollment of students from low- and moderate-income families,

or, alternatively, to stimulate college enrollment generally, with special attention paid to the least financially able students.[65] This section considers the implications of this objective for the design of a family contribution schedule.

A. *Which Students Should Be Aided?*

Although intending to assist students from low- and moderate-income families,[66] Congress gave no guidance for identifying these students. Yet the fact remains that some students will necessarily be deemed ineligible for grant assistance. Because of the lack of any indication of legislative intent, the line defining eligibility for basic grants will thus be drawn somewhat arbitrarily.

Once the set of students eligible for basic grants is established, there remains the question whether any subset of eligibles requires any particular consideration. The authors believe that students from the poorest families should merit special concern. The justification for attention to this subgroup stems largely from our view of the reason for a national commitment to equality of opportunity, a commitment which the basic grant program represents. Equal educational opportunity commands support in a society in which many commodities are unequally distributed because of the extraordinary importance of education to one's opportunity to compete on his merits for as many rewards as his endowment of talent will allow. When educational opportunities are unequally distributed, competition for other rewards is only imperfectly realized. Thus, although college enrollment rates tend to decline with family income at all incomes below $15,000,[67] it is the poorest children whose relief seems the most pressing. In light of this conclusion, the family contribution schedule should be designed to target subsidies to these poorest students. This "targeting" will be expressed mathematically as the proportion of a subsidy budget received by students in the lowest family income groups.

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65 See text following note 11 *supra*.

66 S. REP. No. 346, 92d Cong., 1st Sess. 30 (1971); H.R. REP. No. 554, 92d Cong., 1st Sess. 21 (1971).

67 *See* S. REP. No. 346, 92d Cong., 1st Sess. 27 (1971).

B. *General Higher Education Enrollment Stimulation*

The purpose of the basic grant program can also be viewed as one of stimulating enrollment generally.[68] An enrollment stimulation objective would be grounded not in a notion of "equality of opportunity" but in the notion that college attendance is a desirable activity, with all students who participate equally valued. Use of a subsidy, such as a basic grant, to stimulate college enrollment generally must be based upon an assumption that receipt of a subsidy will alter a person's decision to attend college. The nature of an adolescent's college attendance decision is not well understood, and one cannot always predict precisely what the effect of a subsidy will be. One can, however, postulate and classify possible effects.

The decision to attend college is really a set of decisions: the decision whether to attend, and if so, what institution, what kind of program, and so forth. The effect of a subsidy on this set of decisions may be quite complicated and may vary from person to person. To a given prospective college student, for example, a subsidy may produce no change in the decision whether to attend, but might change his decision about the type of institution. For simplicity, however, it will be assumed that a potential college student faces a single decision about college attendance — the decision about how many resources to allocate to the purchase of higher education. A decision not to attend is, then, a decision not to allocate any resources.[69]

The effect of a subsidy on this decision can take several forms. The subsidy may simply substitute for resources the student and his family would have allocated in its absence. On the other hand, the effect of the subsidy might be additive, with the subsidy used to purchase higher educational services in addition to those the student would have purchased in its absence. A subsidy might have both additive and substitutive effects, causing a student to allocate more resources to education than he otherwise would have, but with the additional amount allocated not matching the subsidy.

68 See text at note 16 *supra*.

69 It is a simplification, of course, to speak of the student's decision, when in fact, the decision may be made by the family. The term student's decision is used as shorthand.

A subsidy might also have a stimulative effect upon student resources. Having received the subsidy, a student might decide to allocate even more resources to education than he would have in its absence. The stimulation phenomenon, where a student spends more private resources after the subsidy than before, is possible where the product is offered in discrete quantities which differ substantially in price. If a prospective purchaser finds no discrete unit which corresponds to the amount he wants to spend, he may settle for a smaller quantity and spend less than he would have preferred. But when added to the original amount he was willing to spend, a subsidy might allow him to purchase a greater quantity than before.

The lesson of these observations for increasing college enrollment by distributing federal subsidies seems fairly clear: government should subsidize only those students for whom the subsidy effect will be at least partly additive. If the total amount of funds available for the subsidies is limited, the greatest aggregate increase in enrollment will be achieved by awarding subsidies first to those students for whom subsidies would produce a stimulative or fully additive effect, then to students for whom the effect would be only partly additive. Students for whom the effect would be entirely substitutive should receive no subsidy, since by hypothesis, the subsidy would not change the amount of education they purchase. The type of subsidy effect on a given student is not likely to be the same regardless of the amount of the subsidy. It seems plausible that even if rather small subsidies produce a fully additive effect on a particular consumer, as the size of the subsidy increased a partially substitutive effect would begin to appear.[70]

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70 The aggregate enrollment effects of a total subsidy budget thus depend upon which students receive subsidies and upon how much they receive. If perfect information were available, the optimal distribution of subsidies to students — *i.e.*, the distribution which causes the greatest enrollment expansion possible under the subsidy budget — could be arrived at by the following procedure. First, one would take the smallest subsidy whose effects were measurable, say, $50, and identify those students for whom the subsidy effect would be stimulative or fully additive. Second, having identified those students, one would make a mental note to award them a $50 subsidy and treat them as if they had already received the subsidy. These $50 subsidies would then be added and the aggregate compared with the available subsidy budget. If funds were not exhausted the process would be repeated. Those students who display an additive effect if given an additional $50 subsidy would be

These subsidy effects are directly relevant to the design of a family contribution schedule for the basic grant program. The contribution schedule discriminates among families according to their measured ability to pay for higher education. Income is the shorthand expression for this ability. Using the contribution schedule as a device for stimulating enrollment pre-supposes some relationship between subsidy effects and family financial circumstances. If the two were entirely unrelated the contribution schedule itself could not be used successfully as an instrument of change.

There is, however, some evidence that subsidy effects are related to family financial circumstances: additive effects are generally more likely as financial resources decline. Intuitively, it seems plausible that a subsidy should make a greater difference to one's college plans the lower his family's resources. Although this observation is far short of "perfect information," the evidence which is available tends to support this hypothesis. Several studies have investigated the hypothesis by asking students to predict how college attendance plans would change in response to various changes in family income. In a December 1969 survey conducted by the American Council on Education, students who had entered college in each of the four preceding Septembers were asked the effect on their education plans of cost of education increase of $300 annually. Although the relationship was not perfectly established, students from families with lower incomes responded "quit school" or "go to a less expensive college" more frequently than students from families with higher incomes.[71]

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located. The students so identified probably would be some subset of the first set of students, who responded to the initial $50 subsidy. Another mental note would be made to award a second $50 subsidy increment to the second group, and the process of comparing with the budget and repeating the allocation process would be continued until either the subsidy budget were exhausted or until marginal effects became substitutive for all students. At that point, from an enrollment stimulation standpoint, the optimal distribution of subsidies would be reached. This method of marginal analysis will determine the optimal distribution only if additivity of subsidy effect declines monotonically as the subsidy is increased in size for all students. Stated another way, a student who will show an additive effect for a $100 subsidy but not for a $50 subsidy would spoil the marginal analysis. For marginal analysis to achieve the correct result, this possibility must be minimized by carefully choosing the initial incremental subsidy.

71 American Council on Education, Dec. 1969 Follow-Up Study of Freshman (on file with ACE, Washington, D.C.).

These answers indicate that lower-income students tend to be more responsive to a given increase in college costs than higher-income students. It is plausible to reason, therefore, that they would also be more responsive to a reduction in costs, whether effected by a decrease in the price charged by colleges or by receipt of a subsidy.

The subjects of the ACE survey were already attending college, and one must be careful about extrapolating from their responses to those adolescents who have not attended college and whose enrollment we are trying to stimulate. Poor adolescents not attending college may not respond to an educational subsidy. They may lack perserverance or find that college education is not relevant for their goals and ambitions. If money alone will not induce poor adolescents to enroll, a well-designed student aid program should verify this theory, for the effect of subsidies on enrollment rates will be observed in the operation of the program. In determining an initial distribution of subsidies, the government should follow the hypothesis that those from poor families will be more responsive. This hypothesis is more plausible than its converse, or the supposition that family finances make no difference.

Whether the basic grant program is viewed as one designed to assist primarily the poor or, alternatively, as one designed to increase college enrollment, the program should be concerned with how well a family contribution schedule targets funds to students from low-income families. If basic grants are viewed solely as an enrollment-increasing device, students from lower-income families are still especially deserving because of their greater responsiveness to a subsidy than students from higher-income families. Of course, the information is inadequate to relate responsiveness to specific subsidy amounts, and it might prove inadequate to help arrive at an optimal distribution for increasing enrollment. However, the distribution of subsidy funds among students will be dictated in some measure by the equity criteria discussed in previous parts and by statutory constraints. The remaining discretion in subsidy distribution may be limited to choosing between alternative contribution schedules which satisfy other objectives and constraints. It might, therefore, be necessary to choose among contribution schedules which, within a narrow range target funds

best at the students from low-income families. The information available surely supports such a decision rule.

C. *Subsidy Distribution under a Family Contribution Schedule*

The distribution of basic grants to students from different family income groups will depend upon the following factors: the distribution of basic grant recipients among income groups; the distribution of basic grant recipients among institutions; the total budget for the basic grant program; and the family contribution schedule. The distribution of recipients among income groups and the contribution schedule will be the primary determinants of entitlements. The distribution of recipients among colleges is also important because the statute limits awards to half the annual cost of attendance,[72] and this ceiling is likely to affect students of different family incomes differently. The budget level is relevant because, in the event all awards cannot be fully paid, the statute prescribes reductions.[73] Since the separate effect of the characteristics of the contribution schedule on the distribution of basic grant funds is to be investigated, certain assumptions must be made about the remaining factors.

Neither the family income distribution of recipients nor the distribution of recipients among institutions can be predicted precisely because the very availability of basic grants will probably alter this distribution. Little information is available with which to predict the magnitude of the alterations. Nevertheless, it is reasonable to assume that the effects of a subsidy will not be immediate and that great changes will not occur in the first few years of the program. Current distributions of college students can therefore be used to approximate the distribution of recipients in the first operating year of the program.[74]

Budget levels for the basic grant program are similarly difficult to predict because the program lacks an appropriation's history.

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72 20 U.S.C.A. § 1070a(a)(2)(B)(i) (Supp. Oct. 1972).

73 *Id.* § 1070a(b)(3)(B).

74 This study uses joint college-family income distributions from Hartman, *supra* note 53, at 493, modified to conform to a fall 1971 undergraduate full-time enrollment of 5.6 million. *See* U.S. Bureau of the Census, Undergraduate Enrollment in Two Year and Four Year Colleges, Oct. 1971, P-60, No. 236, June 1972.

Accordingly, the effects of family contribution schedules are investigated under different budget levels. In order to demonstrate the importance of budget levels, it is necessary to consider briefly how grants are reduced when the budget will not satisfy all entitlements.

The budget required to pay each recipient his full entitlement is referred to as the Level I budget. When the budget is insufficient to meet all entitlements, the statute prescribes a "first round" of grant reductions, in accordance with the following formula: 75 percent of any entitlement which exceeds $1,000; 70 percent of any entitlement between $801 and $1,000; 65 percent of any entitlement between $601 and $800; and 50 percent of any entitlement which does not exceed $600.[75] A budget sufficient to allow all recipients to be paid grants reduced according to this formula is called the Level II budget. When the budget is less than the Level II budget, the statute prescribes pro rata reductions of grants which have been computed with the above formulas.[76] Any budget below Level II is called a Level III budget.[77]

Because of the reduction formulas presented above, the same family contribution schedule will produce different proportional allocations of basic grant funds among income groups for different budget levels. To achieve a particular proportional allocation of funds, one might wish to have different family contribution schedules for different budget levels. A set of contribution schedules corresponding to different total budgets would make family contributions contingent upon the amount of appropriations for the grant program. Such a procedure, however, appears to be precluded by the statute, which defines the family contribution for a student as the "amount which the family of that student may be reasonably expected to contribute toward his postsecondary education for the academic year."[78] While the reasonableness of a contribution may depend upon certain assumptions about the

75 20 U.S.C.A. § 1070a(b)(3)(B)(i) (Supp. Oct. 1972).

76 *Id.* § 1070a(b)(3)(B)(iii).

77 For budgets between Level I and Level II, the statute calls for allocation among students of the excess according to the unpaid portion of their entitlements. *Id.* § 1070a(b)(3)(B)(ii). This refinement will be ignored in the following analysis.

78 *Id.* § 1070a(a)(3)(B)(i).

family's ability and willingness to pay, it is difficult to support an argument that reasonableness will depend as well on the appropriation itself. Thus it appears that the basic grant program cannot operate with a set of contribution schedules corresponding to different budgets. The same contribution schedule must allocate funds regardless of the congressional appropriations.

D. *The Performance of Contribution Schedules in Stimulating Enrollment*

1. The College Scholarship Service Contribution Schedule

Table II presents the results of allocating basic grant funds under the three budget levels using the CSS schedule[79] and an alternate schedule.[80] The total budgets should not be interpreted as precise cost estimates for the basic grant program, since enrollment statistics are for 1971. However, family income distribution of college students probably will not change dramatically in a few years, and therefore conclusions about the proportional allocation of funds among income groups should be accurate. From Table II, it appears that under a Level I budget (in which all entitlements are fully paid) a schedule based on the CSS parental contribution schedule does not adequately direct basic grant funds toward students from low-income families. Students from families earning less than $5000 receive less than one-third of

79 In studying the performance of the CSS parents' contribution schedule in stimulating enrollment, certain simplifications were made to ease computations. First, contributions from applicants themselves were ignored, making it possible to use only the parental contribution curves. This simplification seemed justifiable, since actual student contribution information is not available and the CSS need analysis treats student contributions rather loosely. Second, family net worth was ignored so that the parents' contributions were determined from income alone. This simplification seemed justified, inasmuch as the data relating mean family net worth to family income showed that the retirement allowances permitted by the CSS tended, on the average, to shelter the assets of families earning less than $10,000. See Part IV *supra*. Finally, the parental contribution curve for a two-child family was used to determine all parental contributions. This simplification may cause a distortion in the results. The meager information found relating the family income of college students to family size indicates that among the students who currently attend college, low-income students tend to come from smaller families than higher-income students. *See* D. Mundel, Tax Impact of Special IRS Regulations for Student Dependents, 1970 (unpublished manuscript on file at the John F. Kennedy School of Government, Harvard University). If this information is accurate, then the calculations will show low-income students receiving a larger proportion of funds than they would in fact receive.

80 See Part V D 2 *infra*. See Table II at 463 *infra*.

the total budget. Because of the modest progressivity in the reduction formulas, the CSS schedule under a Level II budget directs funds at lower-income families slightly more effectively, but grants are still not well targeted at low-income families. A Level III budget would produce approximately the same proportional allocation as the Level II budget, but, of course, the average grant per student would be lower in each income group. The budgets necessary to satisfy Levels I and II are quite large — more than $1.4 billion if all entitlements were paid and greater than $1 billion if only "first round" reductions were made.

There are several reasons for the rather poor targeting of funds to low-income students under a CSS-type schedule. The greatest single factor, however, is not the schedule, but the statutory provision which limits a basic grant to half the cost of attendance at college.[81] This provision reduces the grants of low-income students below those which the standard formula — $1400 minus family contribution — would, by itself, prescribe. The half-cost provision is responsible for the fact that average grants actually decline with family income at the lower end of the family income spectrum. The half-cost limitation cuts most heavily against low-income students because they attend less expensive colleges in proportionally greater numbers than more affluent students.[82] This provision in practice will probably work to the detriment of students from low-income families because they will have the hardest time raising the other money necessary to be able to accept the grant in the first place.

But certain characteristics of the CSS parental contribution schedule itself contribute to this rather poor performance. To discover how and why this is so, the CSS schedule must be compared with an alternative.

2. An Alternative Schedule

Figure II shows a curve superimposed over the CSS curve. It should be emphasized that particular points along this alternative curve are much less important than its distinguishing characteristics: a positive contribution even at low levels of income. The

81 20 U.S.C.A. § 1070a(a)(2)(B)(i) (Supp. Oct. 1972).
82 *See* Hartman, *supra* note 53, at 474.

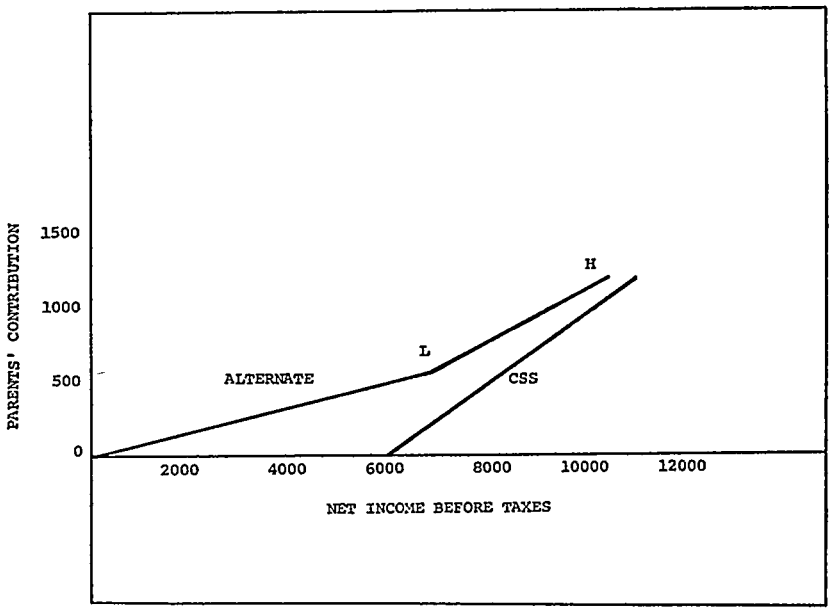

FIGURE II. COMPARISON OF CSS AND ALTERNATE CONTRIBUTION CURVES

alternative curve has been constructed in the following way. Point H is determined by requiring parents who have an annual income corresponding to the Bureau of Labor Statistics intermediate budget to make a $1200 contribution so that they would receive no subsidy when all entitlements were fully paid. Point L on the curve represents the contribution assessed parents having an income corresponding to the Bureau of Labor Statistics low budget. This contribution was calculated in the manner currently used by CSS to determine the "moderate" income contribution. The curve was then formed by joining the origin to point L and point L to point H.

The performance of the alternative schedule obtained from this curve is compared numerically with the CSS schedule in Table II. Under the alternative, basic grants are somewhat better directed at low-income students under both budget levels than they are when the CSS curve is used. Under the alternative, the share of the lowest income group rises from 9 to 12.3 percent under a Level I budget. Similar gains are made by income groups II and III. When performance under Level II budgets is compared, gains

TABLE II
Distribution of Basic Grant Funds by Family Income for Two-Child Families

	Family Income	Level I Budget Proportion	Level I Budget Average Grant	Level II Budget Proportion	Level II Budget Average Grant	Level III Budget Proportion	Level III Budget Average Grant
		CSS Schedule					
I.	<3000	9.0%	$935	11.0%	$872	11.2%	$403
II.	3000-5000	16.6	980	19.7	890	19.8	403
III.	5000-7500	34.8	954	38.1	797	38.0	357
IV.	7500-10,000	31.9	612	26.2	385	25.4	167
V.	10,000-11,200	7.8	221	5.1	110	5.6	54
	Total Budget	$1,456 M		$1,114 M		$500 M	
		Alternative Schedule					
I.	<3000	12.3%	$911	17.0%	$770	17.3%	$580
II.	3000-5000	20.0	839	22.1	572	22.2	423
III.	5000-7500	37.2	719	36.4	436	36.5	321
IV.	7500-10,000	27.4	373	22.3	187	21.8	134
V.	10,000-10,400	2.9	180	2.4	90	2.1	61
	Total Budget	$1,029 M		$637 M		$500 M	

CSS data from CSS Manual, Table A, Appendix B.

by the lowest income groups are even greater, and the share of the lowest two groups is now more than one-third of the budget. The alternative also affects the total cost of the program, lowering the Level I and II budgets below those obtained with the 1971 CSS curve. The Level I budget is slightly less than $1 billion, while the Level II budget is about $650 million. While the precise budget which will be appropriated initially for the basic grant program cannot be predicted, the Level II budget obtained under the alternative appears well within the range of possible appropriations.

Although funds will be better targeted under the alternative, low-income grant recipients may still be better off under the CSS curve if the total budget is close to the Level I budget, because average grants may be higher. Table II shows the average grants obtained by students in each family income group under the two curves. When the curves are compared at a given budget level — not a given budget amount — average grants are lower under the alternative. This result should not be surprising. It follows from the way the alternative curve was drawn — requiring a greater

contribution at every family income than does the CSS curve. The significance of this result is that at Level I funding low-income recipients would be better off under the CSS curve notwithstanding its relatively poorer targeting.

Funding at the Level I budget cannot, of course, be predicted with assurance. When constrained budgets appear likely, the alternative becomes more attractive. Note from Table II that under the alternative at a Level I budget, the average grant for students in the lowest income group is higher than under the CSS curve at a Level II budget, even though the CSS curve is the more expensive. This comparison suggests that if the total funds available for the program were about $1 billion (and therefore Level II formulas were used) some low income students would be better off under the alternative, rather than under the CSS curve.

The differences between the CSS and alternative curves is more striking when their performance is compared under a Level III budget. Table II shows the distribution of the budget and average grants under both curves and a $500 million budget. For each curve, the proportional shares received by students in each income group are nearly the same as those allocated under a Level II budget. Average grants are lower for each curve than they are under the corresponding curve for a Level II budget. A comparison of average grants in Table II, however, is revealing. For students in the lowest income group, the average grant is nearly $200 higher under the alternative than under the CSS curve. For students in income group II, the average grant is slightly higher under the alternative. This phenomenon results from the large pro rata reductions of the grants of all recipients under the CSS curve, reductions which produce the greatest dollar losses for low-income students. These reductions are so severe that the poorest students are better off under the alternative, notwithstanding the fact that it demands a greater contribution from their families.

Under budgets less than $500 million, the average grants seen in Table II would decline under both curves, and the differentials between curves would also decline. But even at low budgets, differentials would not be insignificant. Under a budget of $200

million, for example, the average grant received by students in the lowest income group is nearly $100 greater under the alternative than under the CSS curve. Thus, although the alternative was constructed to increase the parental contribution for students from low-income families, the result at budgets of about $500 million or lower is to make the poorest students better off than they would be under the CSS curve.

The conclusion to be drawn from the above analysis is that more experimentation should be done with curves which require a positive contribution from students at all income levels. Uncritical adoption of the particular curve which has here been designated the alternative is certainly not urged. Instead, further work should be directed at establishing fair contributions to be required from parents at all income levels at which the basic grant program will operate. The contributions which this alternative prescribed may well be too low, since it has ignored student contributions and borrowing by both students and their parents. Parental and student ability to borrow remains largely uninvestigated in the present allocation of private financial aid. As federal support for student and parental borrowing grows, a contribution schedule for the basic grant program cannot afford to ignore this important device for financing higher education. But it remains for another research effort to propose and defend a specific contribution curve, having the general characteristics discussed above.

VI. Conclusion

A parental contribution schedule used to administer federal student aid should be designed in light of program objectives. A principal objective of the Basic Educational Opportunity Grant Program is stimulation of the enrollment of eligible students. Whether the program is viewed as one aimed at enrollment of the poor alone, or at enrollment of students generally, without regard to family financial circumstances, grants should be directed toward low-income students.

The principal mechanism for distributing basic grants according to family income is the family contribution schedule which the

Commissioner of Education is directed to promulgate. The contribution schedules now used to administer private financial aid awards have not been designed to satisfy the objectives of the basic grant program, and their use to administer a program of educational subsidies with public funds would produce several shortcomings.

A contribution schedule should be judged by its effects on the distribution of subsidies to recipients, under varying assumptions about the total budget. While the alternative schedule presented in this article may seem more austere than private systems since it requires even low-income families to make a modest contribution, it increases the proportion and amount of funds received by the low-income students under certain budget levels. Further simulation of the effects of other contribution schedules is probably warranted before the Commissioner chooses one by which to allocate basic grants. When schedules are judged by their effects, a requirement of higher family contributions at all income levels, including low levels, should not be considered unfair. Furthermore, a schedule chosen to operate the federal program should eliminate the compromises in horizontal equity which the private systems currently make in measuring family resources. In any case, the schedules which the Commissioner considers should be similar to the alternative presented in this article.

STATUTORY COMMENT

LEGISLATIVE-EXECUTIVE DISAGREEMENT: INTERPRETING THE 1972 AMENDMENTS TO THE GUARANTEED STUDENT LOAN PROGRAM

HAROLD JENKINS*

Introduction

The comprehensive Education Amendments of 1972[1] were considered by some to be "[t]he most significant piece of legislation on higher education since the national system of land grant colleges was provided in 1862."[2] However, less than two months after enactment of the Amendments, Congress felt compelled to suspend for six months[3] a cluster of its provisions[4] which had made changes in the Guaranteed Student Loan Program.[5] While

*Attorney, Department of Health, Education, and Welfare, Washington, D.C.; A.B., University of Illinois, 1967; A.M., University of California at Los Angeles, 1968; J.D., Harvard University, 1971. This article was written in the author's private capacity. No official support or endorsement by the Department of Health, Education, and Welfare is intended or should be inferred.

1 Pub. L. No. 92-318, 86 Stat. 235 (1972 U.S. CODE CONG. & AD. NEWS 1908) (to be codified in scattered sections of 7, 12, 20, 29, 42 U.S.C.) [hereinafter referred to as "Amendments"].

2 N.Y. Times, May 21, 1972, § 4, at 9, col. 4. The landmark higher education provisions in the Amendments include the establishment of programs of financial assistance to colleges and universities for operating costs (20 U.S.C.A. §§ 1070e, 1134 (Supp. Oct. 1972)) and a program of federal grants to students to cover educational costs exceeding expected family contributions (20 U.S.C.A. § 1070a (Supp. Oct. 1972)). The Amendments also prohibit sex discrimination in the conduct of education programs receiving federal financial assistance. 20 U.S.C.A. §§ 1681-86, 29 U.S.C.A. §§ 203(r)(1), (s)(4), 213(a), 42 U.S.C.A. §§ 2000c(b), 2000c-6(a)(2), 2000c-9, 2000h-2 (Supp. Oct. 1972). Finally, the Amendments have provisions intended to curb busing for racial balance and to facilitate school desegregation by means other than busing. 20 U.S.C.A. §§ 1601-19, 1651-56 (Supp. Oct. 1972).

3 Pub. L. No. 92-391, 86 Stat. 563 (1972 U.S. CODE CONG. & AD. NEWS 3358).

4 20 U.S.C.A. §§ 1074 note, 1075(a), (b), 1077(a)(1), (a)(2)(D), 1078(a)(1), (b)(1)(A), (b)(1)(H), (b)(1)(L), (c)(1), (e), 1080(a), 1084, 1087, 1087-1(a) (Supp. Oct. 1972).

5 20 U.S.C. §§ 1071-87 (1970), *as amended* 20 U.S.C.A. §§ 1071 to 1087-2 (Supp. Oct. 1972).

there could be little doubt that this major federal student aid program had run into troubled waters during July and August of 1972, considerable disagreement existed as to whether the root of the problem was poorly drafted legislation or a misreading of the statutory language by the administering agency, the Department of Health, Education and Welfare (HEW). In an attempt to account for this costly incident and to consider how it might have been avoided, this comment will trace the genesis of the provisions in question, assess their lucidity, and examine HEW's efforts at implementation.

I. The Statutory Provisions and Pertinent Congressional Materials

The Guaranteed Student Loan Program is massive both in the number of students it benefits and in the amount of money it involves.[6] Under the program, eligible lenders such as banks and other financial institutions make loans to students attending institutions of higher education and vocational schools.[7] A student must utilize his loan for expenses related to education. The maximum interest rate which may be charged on a loan is seven percent,[8] and the student usually need not pledge any security or provide a surety.[9] A student does not have to commence repayment of principal until nine to 12 months after he has left school,[10] and he may take five to 10 years to repay,[11] exclusive of periods during which he is engaged in statutorily specified activities when deferment of repayment is authorized.[12] Hence the purpose of the program is to enable students to obtain credit with which they may finance their education and to provide them with favorable interest rates and liberal repayment terms.

Lenders are willing to make loans to students on these terms

6 During the period from July 1, 1971, through June 30, 1972, 1,256,299 loans totalling $1,301,576,723 were made under the program, in which over 21,000 lenders and 8,000 schools participated. Data on file at United States Office of Education.

7 Educational institutions may also be lenders. 20 U.S.C. § 1085 (1970).

8 20 U.S.C. §§ 1077(b), 1078(b)(1)(E) (1970).

9 20 U.S.C. § 1077(a)(2)(A) (1970).

10 20 U.S.C. §§ 1077(a)(2)(B), 1078(b)(1)(D) (1970).

11 20 U.S.C. §§ 1077(a)(2)(B), 1078(b)(1)(D) (1970).

12 20 U.S.C. § 1077(a)(2)(C) (1970); 20 U.S.C.A. § 1078(b)(1)(L) (Supp. Oct. 1972).

because full or substantial repayment of the loans is insured, in some cases by the United States Commissioner of Education and in others by a state or private non-profit guarantee agency having an agreement with the Commissioner.[13] In addition, the Commissioner pays a special allowance to each lender every three months consisting of a percentage (not to exceed three percent per annum) of the total amount of the unpaid principal of all eligible loans.[14]

Before the Amendments took effect, all student borrowers whose "adjusted family income" at the time of the loan was less than $15,000 had the interest which accrued prior to the beginning of repayment of principal paid by the Commissioner of Education.[15] "Adjusted family income" was defined by regulation to consist of 90 percent of the adjusted gross income (as defined in the Internal Revenue Code[16]) of the student and, unless he was independent of them, of his parents and spouse, minus the amount allowable under the Internal Revenue Code for personal exemptions.[17] Thus, if an unmarried student lived with his parents and their other children, he might qualify for the interest subsidy even though his parents' gross income was $20,000 or more.[18]

While the Senate bill would have made no changes in the statutory interest subsidy eligibility provisions,[19] the bill passed by the House of Representatives provided for the complete abandonment of the $15,000 standard as a test for interest subsidy eligibility. In order for a student to qualify for an interest subsidy under the House bill, his educational institution would have had to determine the amount of a loan needed by the student,

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13 20 U.S.C.A. § 1078(b)(1) (Supp. Oct. 1972); 20 U.S.C. § 1079(a)(1) (1970).

14 20 U.S.C. § 1078a (1970), *as amended* 20 U.S.C.A. § 1078a (Supp. Oct. 1972).

15 20 U.S.C. § 1078(a) (1970). Such interest payments are variously known as the "interest subsidy" or "interest benefits." Thus a loan involving such payments is sometimes termed a "subsidized loan."

16 INT. REV. CODE OF 1954, § 62.

17 45 C.F.R. § 177.3 (1972).

18 The benefits of the Guaranteed Student Loan Program, unlike those of most of the other federal student assistance programs, have been readily accessible to students from middle income families. A student may obtain a loan under the program without regard to his, his parents', or his spouse's income, and under the law in effect prior to the Amendments he could often obtain the interest subsidy even though his family was far above the poverty level.

19 S. 659, 92d Cong., 2d Sess. (1972). The debates on this bill do not indicate that any changes in these provisions were adopted on the Senate floor. *See* 118 CONG. REC. S1253-3034 (daily ed. Feb. 7-Mar. 1, 1972).

considering expected family contributions and the cost of pursuing a course of study at such eligible institution; his institution also would have had to provide the lender with a statement evidencing such determination and stating the amount of the loan such student needed.[20] Under this formulation a student still could have obtained loan amounts in excess of his "need," but no interest subsidy would have been payable on such additional amounts. Thus the interest subsidy aspect of the program, but not the loan aspect, would have come under eligibility standards based on a student's economic circumstances; all students could obtain loans, but they could obtain the interest subsidy only insofar as their loans did not exceed the amount of their need.

Under the compromise reached by the conferees, a student borrower is eligible for the payment of the interest on his loan

> only if at the time of execution of the note or written agreement evidencing such loan his adjusted family income is —
> (I) less than $15,000 and the eligible institution at which he has been accepted for enrollment or, in the case of a student who is attending such an institution, at which he is in good standing (as determined by such institution) —
> (α) has determined the amount of need for such loan by subtracting from the estimated cost of his attendance at such institution (which, for purposes of this paragraph, means the cost, for the period for which the loan is sought, of tuition, fees, room and board, and reasonable commuting costs) the expected family contribution with respect to such student plus any other resources or student aid reasonably available to such student, and
> (β) has provided the lender with a statement evidencing the determination made under clause (I) (α) of this paragraph and recommending a loan in the amount of such need; or
> (II) equal to or more than $15,000 and the eligible institution

20 *See* H.R. 7248, § 413, 92d Cong., 1st Sess. (1971). This bill passed on November 4, 1971. 117 CONG. REC. H10457 (daily ed. Nov. 4, 1971). The applicable House report explained the House amendment as follows:

> *Section 413* amends section 428 of the Higher Education Act of 1965 [20 U.S.C. § 1078 (1970)] by removing the $15,000 adjusted family income ceiling as a requirement for a subsidized loan and substituting an institutional decision that the student has a need for the amount of such loan. [It] requires the institution to provide the lender with a statement certifying that the student has evidenced need and stating the amount of the loan needed.

H.R. REP. No. 554, 92d Cong., 1st Sess. 93 (1971).

> at which he has been accepted for enrollment or, in the case of a student who is attending such an institution, at which he is in good standing (as determined by such institution) —
>
> (α) has determined that he is in need of a loan to attend such institution,
>
> (β) has determined the amount of such need by subtracting from the estimated cost of attendance at such institution the expected family contribution with respect to such student plus any other resources or student aid reasonably available to such student, and
>
> (γ) has provided the lender with a statement evidencing the determination made under clause (II)(β) of this paragraph and recommending a loan in the amount of such need.[21]

The recitation of separate eligibility standards for students depending upon whether their adjusted family income is less than $15,000 or is equal to or greater than $15,000 suggests that different treatment of students in the two categories was intended. Thus, the (α) clause in subdivision (II), which is the sole substantive element in (II) that is lacking in subdivision (I),[22] appears to require a school to make an initial determination of need for a student with an adjusted family income equal to or greater than $15,000. That determination may be omitted where the student's adjusted family income is under $15,000. But what is involved in a determination of "need of a loan" to attend school ((II)(α)) that is not also involved in a determination of "the amount of need for" a loan ((I)(α))? And is not a determination of "need of a loan" ((II)(α)) subsumed in a determination of "the amount of such need" ((II)(β))? Clause (II)(α) is superfluous because on its face it requires nothing which is not also mandated in (II)(β). Hence close scrutiny of the (α) and (β) clauses of subdivision (I) and the (α), (β), and (γ) clauses of subdivision (II) would not merely leave the reader with little grasp of an intelligible distinc-

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21 20 U.S.C.A. § 1078(a) (Supp. Oct. 1972).

22 Neither the passage in question nor anything in the relevant legislative materials indicates that the definition of "estimated cost of his attendance at such institution" in clause (I)(α) should not apply equally well to the similar expression in clause (II)(β). The definition itself is cause for wonder, since it does not include the cost of books and supplies, transportation, or personal expenses. No explanation for these omissions was offered in the relevant congressional reports or debates. Representative Quie (R.-Minn.) later indicated that the definition was restricted unintentionally. 118 CONG. REC. E7707, E7708 (daily ed. Sept. 5, 1972).

tion between students in the two income groups, but could also easily lead him to conclude that the statutory language requires both groups to be treated identically.

The conference report on the Amendments discussed the intended significance of the dichotomy between students with adjusted family incomes over $15,000 and those with adjusted family incomes equal to or greater than $15,000 as follows:

> *Interest subsidy provisions.* [*A*] The House amendment eliminated the $15,000 adjusted family income ceiling as a requirement for a subsidized loan and substituted in lieu thereof an institutional decision that the student has a need for the amount of such subsidized loan. [*B*] The House amendment required the institution to provide the lender with a statement certifying that the student has evidenced need and stating the amount of the loan subsidized. [*C*] There was no comparable Senate provision.
>
> [*D*] The conference substitute contains features drawn from both the Senate and House amendments. [*E*] Under it a student would be eligible for an interest subsidy if his adjusted family income is less than $15,000. [*F*] The student's school will furnish the lender with a statement concerning its determination of the amount of the student's need for the loan and a recommendation as to the amount of the subsidized loan. [*G*] In the case of students whose adjusted family income is over $15,000, the school may determine that he [is] in need of a loan to attend the institution. [*H*] If it so determines, it shall provide the lender with a statement evidencing the school's determination of the amount of his need and a recommendation as to amount of the subsidized loan.[23]

Sentence *E*, standing alone, would seem to preserve the preexisting standard which automatically entitled a student to the interest subsidy on his loan if his adjusted family income were less than $15,000. Sentence *F*, however, casts doubt on whether *E* is to be taken without qualification by recognizing that in (I)(α) and (β) the conferees added several new eligibility requirements for students in this income bracket. Sentences *G* and *H* envision a

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23 S. REP. No. 798, 92d Cong., 2d Sess. 174 (1972); H.R. REP. No. 1085, 92d Cong., 2d Sess. 174 (1972) (letters added for purposes of discussion).

Contrary to an inference that might be drawn from sentence *D*, the Senate bill at no time contained an amendment to the preexisting interest subsidy eligibility provisions.

scheme for students with an adjusted family income greater than $15,000. Each school would first determine whether a student was in need of a loan to attend school. Only if it makes such a positive finding would it provide the lender with a calculation of the amount of the student's need and a recommendation as to the amount of the loan on which the interest subsidy is to be paid. It would seem, however, that once a school makes the determination whether a student is "in need," it has also made the determination of "the amount of his need." Thus for students in both the under and over $15,000 categories, a school must calculate the student's need and send a statement of that need to the lender. In this light it would seem that the draftsmen of the above excerpt from the conference report either saw no distinction based on a student's income or saw but could not articulate such a distinction. In any case, the excerpt has little explanatory value.

During the House debate over the conference agreement, there was no consensus over whether a distinction remained in the necessary showing of need for those in the under and over $15,000 categories. Representative Quie (R.-Minn.), the ranking minority member on the House Committee on Education and Labor, made no distinction between the "need" necessary for those in the under $15,000 category and in the over $15,000 category:

> Another concern of the [conference] committee has been the needs of middle and upper middle income students. Under present law all loans made to students with adjusted family incomes of $15,000 or less have the interest paid by the Government while they are in school and during a grace period. All students above $15,000 get no interest subsidy.
>
> I believe the conference report provides a much more equitable rule than the habitually $15,000 rule. Why should the Government pay the interest on a student loan, all of which is not needed for educational costs? Especially when we do not [prior to the Amendments] provide an interest subsidy to students above $15,000 who are truly in need of a loan in order to attend their college or university.[24]

Representatives Ford (D.-Mich.) and Erlenborn (R.-Ill.) made similar statements without noting different standards of need.[25] On

24 118 CONG. REC. H5403 (daily ed. June 8, 1972).
25 *Id.* at H5408, H5415.

the other hand, Representative Perkins (D.-Ky.), Chairman of the House Committee on Education and Labor, hinted at some distinction:

> The conference report . . . retains the proposal in the House bill to liberalize the interest subsidy benefits under the insured loan program. Under current law and in the Senate bill, no student from [sic] an adjusted family income of $15,000 or more could receive an interest subsidy payment. Under the conference report, this will now be possible provided the student can demonstrate need.[26]

But Representative Perkins did not explain how the showing of need required of a student in the over $15,000 bracket differed from that required of a student with a lower adjusted family income. The representatives agreed on the desirability of allowing all needy students to benefit from subsidized loans, and there is no clear difference in their understanding of the requisite "showing of need." Yet they did not indicate whether or not the necessary showing of need was to be identical for all students.

II. HEW'S Regulation and the Resulting Congressional Reaction

HEW and its Office of Education took the view that any distinction based on whether a student's adjusted family income was under or over $15,000 had been abandoned by the Amendments. The preamble to HEW's July 18 regulation stated:

> The central change in the law and [in] the regulation is to shift the basis for the eligibility of a borrower for payment of Federal interest benefits on a loan issued after June 30, 1972, from the existing requirement that the borrower's adjusted family income be less than $15,000 to a standard involving a determination as to whether the borrower is in need of the loan.[27]

The July 18 regulation itself virtually parroted the law by requiring that in order for any student, regardless of his adjusted family income, to be eligible for the interest subsidy on a loan, his school

26 *Id.* at H5423.
27 37 Fed. Reg. 14231 (1972).

"must, prior to the making of such loan, (1) determine . . . the loan amount needed by the student, if any, and (2) recommend that the lender make a loan in the amount so determined."[28]

Ordinarily regulations affecting programs administered by the Commissioner of Education may not take effect until 30 days after they are published in the *Federal Register*.[29] Under a new requirement set forth in the Amendments, regulations affecting the Guaranteed Student Loan Program were not to take effect earlier than 30 days after copies of such regulations had been furnished to the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor.[30] Moreover, HEW's normal practice is to first publish such regulations as a notice of proposed rule making and invite comment from the public.[31] Since the July 18 regulation was implementing statutory provisions which took effect on July 1, 1972,[32] HEW presumed that Congress had overridden the otherwise applicable procedures so that the regulation could become effective at the same time the statute

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28 45 C.F.R. § 177.2(b) (1972). The preamble to the regulation did, however, announce that the Commissioner of Education intended "to issue further regulations, as may be appropriate, setting forth further criteria regarding. . . the basis on which the payment of interest benefits may be made on loans in excess of the recommendation of the educational institution." 37 Fed. Reg. 14231 (1972). Here HEW seemed to be revealing an intention to depart from the literal language of the law, for something called a "recommendation" is actually something more binding than a recommendation if the party to whom it is made is not free to disregard it. But unlike the confused legislative history on the importance of the student's adjusted family income, there is at least some legislative history suggesting what was intended by the term "recommendation." The remarks of Representative Quie are particularly suggestive:

> The conference report provides for an institutional determination of the amount a student needs in order to attend that institution. . . . This amount is made as a recommendation to the lending agency. We continue to leave to the banks of [sic] the final determination of the amount of the loan. But I certainly would not expect any lending institution to exceed the institutional recommendation unless there is just cause. And I would expect the guaranty agencies, including the Federal Government, to disapprove the guaranty of such subsidized loans which exceed the institution's recommendation by any substantial amount without proper justification.

118 CONG. REC. H5403 (daily ed. June 8, 1972).

29 20 U.S.C. § 1232(b) (1970), *as amended* 20 U.S.C.A. § 1232 note (Supp. Oct. 1972).

30 20 U.S.C.A. § 1088d (Supp. Oct. 1972).

31 HEW statement of policy, *Public Participation in Rule Making*, 36 Fed. Reg. 2532 (1971).

32 20 U.S.C.A. § 1001 note (Supp. Oct. 1972).

did.[33] Hence, Congress and the general public did not have the normal opportunity to comment on and prepare for the new regulation.

Senator Pell of Rhode Island, Chairman of the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, stated that the conferees had adopted a needs test for eligibility for the interest subsidy, but only for students from families with adjusted family incomes in excess of $15,000. He therefore objected to the regulatory requirement that a needs test be administered for all students, regardless of income.[34] In view of the language of subdivision (I) of the pertinent statutory provisions, there would seem to be no doubt that some sort of a determination of need was required even for students below the $15,000 mark. Senator Pell, however, made no specific reference to the language of the law but instead gave the following version of Congress' intent:

> The institution of a "needs test" for those from families under $15,000 was not the intent nor purpose of this legislation. When one considers that we wished to broaden the program and make it available to more families, it should be clear that interpreting the legislation in a manner which restricts availability of loans is directly contrary to the intent. It is our view that there is a presumption of need for families with incomes of $15,000 or less, as there was before the legislation was enacted, and that the need factor is only to be taken into consideration with families of $15,000 or more income. Therefore, an HEW regulation requiring a needs finding for all loans is clearly a contravention of law.[35]

It is difficult to see how HEW could have deduced from the statutory language, or the legislative history, that the formulation set forth in this passage was intended.[36]

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33 37 Fed. Reg. 14231 (1972).

34 118 CONG. REC. S12455 (daily ed. Aug. 1, 1972).

35 *Id.*

36 Senator Pell also objected that the July 18 regulation stated that a lender could loan no more, if the interest subsidy were to be paid, than the student's school recommended. *Id.* As discussed in note 28 *supra*, the preamble to the regulation spoke merely of an intent to further regulate the making of loans in excess of a school's recommendations; it made no mention of making a school's recommendation an absolute ceiling for the amount of a loan eligible for the interest subsidy.

In a letter to the Commissioner of Education, several congressional critics argued that the conference report described "in absolute terms" the eligibility of students with adjusted family incomes of less than $15,000 to receive the subsidy.[37] They said that for students under $15,000 "the only issue to be addressed by the educational institution under such circumstances is the *amount* of the student's need, and the amount of the loan it will recommend."[38] There was, however, no explanation of how a school would compute the amount of a student's need for a loan without also determining whether he is in need of a loan, or vice versa. The letter made this further summary statement:

> We intended to leave existing law substantially unchanged with respect to students with adjusted family incomes of less than $15,000, adding only the requirement that the educational institution have some input into the judgment reached by the lender before the loan is made. This input was not intended to be conclusive, and students with adjusted family incomes of above and below $15,000, respectively, were not intended to have to proceed on the same footing.[39]

In response to the congressional comments, meetings were held between congressional and HEW personnel in an attempt to reach agreement on the meaning of the new statutory interest subsidy eligibility provisions.[40]

Meanwhile, a considerable slowdown in the processing of loans began to develop. Several hundred thousand students who had expected to obtain subsidized loans under the program had their

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37 Representatives Perkins (D.-Ky.) and Brademas (D.-Ind.) and Senators Williams (D.-N.J.), Pell (D.-R.I.), and Randolph (D.-W.Va.) sent a letter to the Commissioner of Education, criticizing his interpretation of the Amendments. 118 CONG. REC. S12455 (daily ed. Aug. 1, 1972).

38 *Id.*

39 *Id.* Critical reference was also made in the letter to OE Form 1260, the "Student Loan Application Supplement" issued in July of 1972 to implement the July 18 regulation. The authors objected to the statement in the instructions for the form that "[i]f the educational institution makes no recommendation for a loan (*i.e.*, the amount entered [as a recommendation] is $0.00 or a negative figure), the loan is not eligible for the Federal Interest Benefits." They argued that such a rule would be acceptable for students in the over $15,000 category, but not for the under $15,000 category because of the "statutory presumption of need" for the latter. The instruction seemed based on the notion, reasonable although not beyond question, that a recommendation for a loan in negative amount is in fact not a recommendation.

40 Education Daily, Aug. 3, 1972, at 4; *id.*, Aug. 4, 1972, at 1.

applications delayed or denied because of the new rules or because of confusion over them.[41] A letter from the American Bankers Association called attention to the time pressure created by each student's need to obtain a recommendation from his school; the letter expressed doubt that all applications could be processed before school opened.[42] The National Association of Student Financial Aid Administrators objected that the July 18 regulation had slowed down the processing of loans because of its "burdensome new administrative requirements" and that it had discouraged lender participation because of "increased red tape and additional processing costs of billing interest to individual students."[43] Representative Green (D.-Ore.) placed in the *Congressional Record* a number of letters which reported that the new interest subsidy eligibility rules were seriously impeding the making of loans.[44] Apparently the inability of HEW to print and distribute quickly enough a new form promulgated with the July 18 regulation exacerbated the problem.[45]

To put the various objections into perspective, it should be noted that the only new requirement of any conceivable complexity in the July 18 regulation was the determination by a student's school of his "expected family contribution." There was no apparent reason why a school could not easily obtain the other information needed for a computation of "amount of need" for a loan — *i.e.*, the estimated cost of attendance at such institution and other aid reasonably available to the student. Even prior to the Amendments a student applying for a federally insured loan was required to provide a statement from his school listing his educational costs and verifying his statement as to his other financial aid. In addition, the school had to provide other information concerning the

41 Chronicle of Higher Education, Aug. 28, 1972, at 1, col. 4; 118 CONG. REC. E7576 (daily ed. Aug. 17, 1972) (remarks of Representative Roy, D.-Kan.); *id.* H8027 (daily ed. Aug. 18, 1972) (remarks of Representative Green, D.-Ore.).

42 118 CONG. REC. S12836 (daily ed. Aug. 4, 1972).

43 *Id.* at H7887 (daily ed. Aug. 17, 1972) (remarks of Representative Perkins, D.-Ky.). The reference to billing costs was based on the reasoning that fewer students would be eligible for the interest subsidy under the July 18 regulation than under its predecessor and that lenders would therefore have to collect interest from an increased number of students directly, as opposed to collecting it through consolidated billing of the Commissioner.

44 *Id.* at H8028 (daily ed. Aug. 18, 1972).

45 Education Daily, Aug. 10, 1972, at 1.

student's enrollment status and academic work load.[46] Indeed, Representative Quie later traced the difficulties emerging from the new statutory provisions to the complex methods of determining a student's expected family contribution which were specifically approved in the July 18 regulation.[47] Such an explanation rings rather hollow, when it is considered that the regulation approved any

> method covered by an agreement between the eligible institution and the Commissioner in connection with the administration of any other program of Federal financial assistance, or determinations made under generally recognized needs analysis systems, such as the Alternate Income System, the American College Testing Program System, the College Scholarship Service System, or the Income Tax System. . . .[48]

There is no apparent reason why methods used under other federal student assistance programs are too complex for the Guaranteed Student Loan Program.

Perhaps the distracting feature of these methods was not their complexity but the fact that they added so much time, in some cases a month or more, to the period between a student's first contact with a lender and approval of the loan. Lenders were not accustomed to lengthy application periods for loans, and schools were not used to including a computation of expected family contribution in applications for assistance under this program. Under pre-existing law, a school did not have to determine the amount of a student's need before he could apply for the interest subsidy; thus, a student could wait until July or August before applying for a subsidized loan and still be assured of the loan's approval before school began. What information the schools did have to provide could be quickly gathered. An additional problem may have been created by the fact that borrowers from middle income families, who were generally ineligible for assistance under the other federal student financial aid programs, were unaccustomed to the need analysis with which many students from low income families had become familiar. No official advance warning from

46 45 C.F.R. § 177.44 (1972); OE Form 1154 (1971).
47 118 CONG. REC. E7708 (daily ed. Sept. 5, 1972).
48 45 C.F.R. § 177.2(c)(2) (1972).

HEW as to the new rules was possible because the Amendments were not enacted until June 23, 1972, eight days before they were to take effect.[49] Indeed, the day before he signed the Amendments, the President indicated that he was unsure whether he would do so because of the inadequacy of the busing restrictions.[50]

Early in the week of August 14, it appeared that HEW might issue a new interest subsidy regulation that would be acceptable to concerned members of Congress. However, the Office of Management and Budget or the Department of the Treasury, or both, may have opposed the new regulation to hold down federal outlays or to mollify lenders concerned about excessive paperwork.[51] Thus the Administration apparently decided later that week to withhold HEW's new regulation on the supposition that a suspension of the new statutory interest subsidy provisions would be enacted. HEW Assistant Secretary for Legislation Stephen Kurzman stated that although the Administration and Congress had resolved differences over the law's meaning, the imminence of the fall semester made it unwise to promulgate a new regulation.[52] On August 16 the President sent a message to Congress requesting emergency legislation to suspend the implementation of the new statutory interest subsidy eligibility provisions. This legislation was to enable students to cover the costs of returning to school through a loan scheme based on eligibility requirements in force before the Amendments.[53] The same day, a joint resolution was introduced in the Senate which would have made any student who applied for a loan prior to April 1, 1973, and whose adjusted family income was less than $15,000 eligible for the interest subsidy retroactive to July 1, 1972.[54] In support of the resolution Senator Boggs (R.-Del.) observed:

> [T]hrough a combination of ambiguous law and overrestrictive regulations, the guaranteed student loan program has come to an almost complete stop; and we are finding that many students from middle- and low-income families who had

49 20 U.S.C.A. § 1001 note (Supp. Oct. 1972).
50 N.Y. Times, June 23, 1972, at 14, col. 4.
51 Education Daily, Aug. 15, 1972, at 1; *id.*, Aug. 18, 1972, at 7.
52 Education Daily, Aug. 18, 1972, at 7.
53 118 CONG. REC. S13723 (daily ed. Aug. 16, 1972) (message from the President)
54 S.J. Res. 260, 92d Cong., 2d Sess. (1972).

> to borrow to pay for their education in previous years are now learning that they are no longer eligible for subsidized loans under this program.[55]

Senator Dominick (R.-Colo.) blamed the July 18 regulation for the unsatisfactory situation, describing it as "so cumbersome and so troublesome that very few students have been able to get past the institution's financial aid officer and through the bank."[56] After Senator Scott (R.-Pa.) also stressed the urgency of the joint resolution, it was passed.[57]

The next day Representative Green (D.-Ore.) proposed an amendment[58] to the resolution passed by the Senate to suspend until March 1, 1973, all amendments to the Guaranteed Student Loan Program[59] except for those extending the program[60] and those establishing a new Student Loan Marketing Association.[61] The House and Senate agreed to this amendment[62] and it was signed into law by the President on August 19.[63]

The resolution as enacted exempts administrative action taken to effectuate it from the time-consuming notice procedures otherwise required by statute. One of the effects of the resolution, of course, was to make students with adjusted family incomes of more than $15,000 ineligible for the interest subsidy during the suspension period. Following the enactment of the resolution, HEW rescinded its July 18 regulation.[64]

On October 28, 1972, HEW promulgated a notice of proposed rule making which made a limited distinction between students with adjusted family incomes over $15,000 and those with lesser adjusted family incomes.[65] The distinction, if there was to be one,

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55 118 CONG. REC. S13722 (daily ed. Aug. 16, 1972).

56 *Id.*

57 *Id.* at S13723.

58 *Id.* at H7884 (daily ed. Aug. 17, 1972).

59 20 U.S.C.A. §§ 1074 note, 1075(a), (b), 1077(a)(1), (a)(2)(D), 1078(a)(1), (b)(1)(A), (b)(1)(H), (b)(1)(L), (c)(1), (e), 1080(a), 1084, 1087, 1087-1(a) (Supp. Oct. 1972).

60 20 U.S.C.A. §§ 1074(a), 1078(a)(4), 1083(c) (Supp. Oct. 1972).

61 20 U.S.C.A. § 1087-2 (Supp. Oct. 1972). This association was designed to provide a secondary market for guaranteed student loans.

62 118 CONG. REC. H7889 (daily ed. Aug. 17, 1972); *id.* at S14013 (daily ed. Aug. 18, 1972).

63 Pub. L. No. 92-391, 86 Stat. 563 (1972 U.S. CODE CONG. & AD. NEWS 3358).

64 37 Fed. Reg. 17036 (1972).

65 *Id.* at 23152 (1972), *amending* 45 C.F.R. § 177.2 (1972). Published with this regulation was a form intended for use with applications for the interest subsidy

necessarily had to be devised without guidance from the ambiguous statutory language. Thus the October 28 proposed regulation provided that for any student to be eligible for the interest subsidy, his school must follow the same course as under the July 18 regulation — determine the loan amount needed by the student, if any, and recommend that the lender make a loan in the amount so determined. These additional provisions, however, were then added:

> [T]he loan must not exceed the eligible institution's recommendation unless the basis for the lender's making a larger loan has been reduced to writing and made a part of the lender's records. In addition, in the case of a student with an adjusted family income equal to or greater than $15,000, if the loan exceeds the eligible institution's recommendation, a portion of the interest on such loan will be paid . . . only if prior to making the loan the lender consults with the eligible institution with respect to the latter's recommendation. The lender must keep a record of such consultation.[66]

The additional provisions thus more or less explicitly provided that the school's recommendation was in fact to be no more than a recommendation, which a lender could exceed if it could reduce to writing a basis, of unspecified nature, for doing so. Where the student's adjusted family income exceeded $15,000, the required consultation with the school would appear to be window dressing, since there was no requirement that the lender defer to the school's calculation. Inasmuch as the July 18 regulation placed no binding limits on the freedom of a lender to exceed a school's recommendation, the October 28 regulation was in substance quite similar to its predecessor. The chief difference between the two was that the latter appeared to distinguish between students over and under the $15,000 figure.[67]

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under the new provision. The instructions for the form intended to implement the July 18 regulation did provide that a student would be ineligible for the interest subsidy if a recommendation for a loan in a positive amount was not made on his behalf. See note 39 *supra*. This limitation did not appear in the instructions for the revised form published with the October 28 regulation.

66 37 Fed. Reg. 23152 (1972).

67 The October 28 regulation also afforded schools more flexibility in determining a student's "expected family contribution," and thus his recommended loan amount, by authorizing them to

> make appropriate adjustments to the results reached under any of

Many of the comments received in response to the October 28 regulation were highly critical but did not appear to acknowledge the language of the suspended statutory provisions.[68] Thus, large numbers of respondents expressed the desire that no school recommendation for the amount of a loan be required for a student whose adjusted family income was less than $15,000. They argued that the recommendation process would create considerable work, delay, and expense for schools and lenders.[69] Few concrete suggestions for improving the regulation within the confines of the law were received. As a result, the regulation was adopted with only minor modifications on January 3, 1973, to take effect March 1, 1973, when the suspension of the applicable legislative provisions was to cease.[70]

III. Conclusion

Members of Congress were, of course, in a better position than HEW to convince the public of the correctness of their views of the controversy. While HEW felt constrained to adopt a posture as consistent as possible with the words of the law, a number of members of Congress advocated regulations which would, after the fact, reflect their intentions in enacting the law. Hence, it was predictable that HEW would appear to be responsible for the snafu.[71]

While one may take issue with several elements of HEW's attempt to implement the new interest subsidy provisions of the Amendments, it can be concluded that on the whole HEW did a

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> the approved methods [of computing expected family contribution] so as to consider more meaningfully the individual circumstances of the student involved and, where applicable, his parents or spouse.

37 Fed. Reg. 23152 (1972). Many officials of educational institutions were pleased by this added flexibility, although still concerned about their expected new work load. Chronicle of Higher Education, Nov. 13, 1972, at 2, col. 2.

68 These comments are on file at United States Office of Education, Department of Health, Education, and Welfare, Washington, D.C.

69 Numerous criticisms were also made of the form which was published with the October 28 regulation. *Id.*

70 38 Fed. Reg. 24 (1973).

71 *See, e.g.*, Washington Evening Star and Daily News, Sept. 18, 1972, at B-6, col. 1 (night final ed.).

reasonable job of seeking to carry out the mandate of some poorly drafted law. Far from being susceptible to a number of conflicting but reasonable interpretations, the new interest subsidy eligibility provisions are much more accurately described as gobbledegook. As if to affirm this characterization, the members of Congress who expressed their thoughts on the meaning of the new provisions almost uniformly avoided discussing the language of the provisions; instead, they expounded on what their "intent" was in adopting them.[72] Even if HEW had had the benefit of all these post hoc statements of intent, to the extent that they embodied concepts which were obviously absent from the law and in many cases contradicted each other, it is uncertain how HEW would have implemented the statute. Such uncertainty would seem to be inevitable whenever legislators attempt to use statements of intent not to supplement statutory provisions but to serve as substitutes for drafting provisions clearly.

Representative Perkins' description of the labors of the conference committee in drafting the final version of the Amendments illuminated circumstances which may have been at the heart of the ambiguity of the new eligibility provisions. He noted that the committee met 21 times, usually from the early afternoon until well into the evening, for a total of more than 100 hours. The last session of the conference committee, on May 16, extended over 15 hours, ending at 5:30 a.m. on May 17. There were more than 383 substantive differences between the House and Senate bills.[73] The focus of such marathon bargaining must inevitably be on compromise rather than draftsmanship, not only for the conferees themselves but for their staff as well. And the fact that the congressional debate focused in the later stages more on busing than on higher education raises the distinct possibility that the

72 Ironically, had HEW taken the view that the new provisions were clear on their face and merely inserted them verbatim into the regulations, Congress would not have had a scapegoat for the confusion which would then have resulted.

Another bizarre disparity between congressional intent and the language of the Amendments was on the question whether educational institutions should be compensated by the Commissioner for determining the eligibility of their students for the interest subsidy. Although no provision to this effect appears in the Amendments, the conference report stated that the Senate conferees had agreed to a provision in the House bill authorizing such compensation. S. REP. No. 798, 92d Cong., 2d Sess. 175 (1972); H.R. REP. No. 1085, 92d Cong., 2d Sess. 175 (1972).

73 118 CONG. REC. H6023 (daily ed. June 22, 1972).

loan program issues may have been overshadowed in the conferees' minds by the need to reach agreement on busing.[74]

On the other hand, it is not inconceivable that the interested conferees fully recognized the ambiguity of the interest subsidy provisions adopted in conference but, having failed to reach agreement with each other as to the desired concept, opted for ambiguity in hopes that HEW would construe the provisions as each side would have liked to have enacted them. This type of approach can be successful, however, only where the language actually enacted is such that it may be read rationally as the concerned legislator wishes. As has been discussed, the interest subsidy provisions enacted are not susceptible to a construction, urged by some members of Congress, whereby some distinction is made between students over and under the $15,000 adjusted family income mark. Even those members who insisted that there is such a distinction were unable to explain just what it is.

In light of the end product of the conferees' efforts, thought by some to be a monumental legislative achievement,[75] it may well be that deficiencies in drafting one or a few of the many provisions in the legislation are a small price to pay for such an accomplishment. As this comment has attempted to show, however, that price was paid with regard to the Guaranteed Student Loan Program. The combination of bits and pieces from the cohesive interest subsidy eligibility provisions of the House bill with bits and pieces from the previous statutory formulation resulted in a section which is incomprehensible on its face. As a result, one of the first products of the Amendments was quite unintended and undesired — a fog of confusion over the previously highly successful Guaranteed Student Loan Program.

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74 The House on two occasions took the extraordinary step of instructing its conferees to "insist" on the rigorous curbs on busing in the House bill as opposed to the milder restrictions in the Senate bill. 118 CONG. REC. H1860 (daily ed. Mar. 8, 1972); *id.* at H4424 (daily ed. May 11, 1972). For their part, the conferees agreed that inasmuch as the busing issue was the most difficult they would not discuss it until all other differences between the two bills had been resolved. N.Y. Times, May 8, 1972, at 33, col. 1. Subsequently, many members of Congress made clear that their vote on the conference agreement would be a function of their views on the busing provisions therein. *See* 28 CQ ALMANAC 397-98 (1972).

75 N.Y. Times, May 21, 1972, § 4, at 9, col. 4.

NOTE

CABLE MOGULS AND PERPLEXED LOCALS: A MODEL APPLICATION FORM FOR A CATV LICENSE

Introduction

When people talk about cable television, they are most often referring to a technology which can now send 20 channels or more of television programming through a coaxial cable hooked to a conventional home television set. Regular broadcast television signals are first received by the large antennas of a cable television system, and then transformed into electronic signals which pass through the cables. Subscribers are currently paying six to eight dollars per month to have these cables connected to their television sets in order to obtain better reception and more channels.

Cable television, however, is more than the "television of abundance."[1] It may mean a communications revolution.[2] The range of services predicted for the cable appears to be endless.[3] A "wired nation"[4] could mean audio and visual communications between any two subscribers in the United States, and people may one day conduct much of their business through these webs of wire. Activities ranging from grocery shopping to the diagnosis of medical problems could all be performed through the cable. Subscribers may one day even receive reproductions of their local newspapers in addition to conventional television signals. Employ-

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1 ON THE CABLE: THE TELEVISION OF ABUNDANCE, REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS (1971) [hereinafter cited as the SLOAN REPORT].

2 "Cable technology, in concert with other allied technologies, seems to promise a communications revolution. There have been such revolutions before. Some five hundred years ago the hand-written manuscript gave way to the printed book . . . . Some hundred years ago the first telephone wires were strung. . . . The revolution now in sight may be nothing less than either of those. It may conceivably be even more." *Id.* at 2.

3 *See* THE URBAN INSTITUTE, CABLE TELEVISION IN THE CITIES: COMMUNITY CONTROL, PUBLIC ACCESS, AND MINORITY OWNERSHIP 13 (1971); Masters, *Drafting Municipal Franchises for Cable Television Systems*, 4 MANAGEMENT INFORMATION SERV. 2, 11-13 (1972) (listing nearly 100 services cable might offer).

4 R. L. SMITH, A WIRED NATION (1972).

ing a fraction of the bandwidth (*i.e.*, space on the cable) that television channels require, computer transmissions can travel through the cable. Some have suggested that the potential to connect a nationwide cable television system with a central computer raises the specter of a society resembling George Orwell's 1984 state.[5] Certainly whoever controls an individual cable television system that serves one municipality, or an integrated system that serves the entire nation, may one day monopolize the satisfaction of our communications needs.

Because of these far-reaching potentials of cable technology, decisions made today regarding cable television will affect us now and in the future. The current process of licensing CATV (community antenna television) systems is especially important because cable television is still in its initial growth phase. Government authorities may still be able to determine what types of systems are built and how they serve the people. At the present time, there are approximately 2750 distinct cable television systems in the United States, servicing 5.9 million households, or about nine percent of all television households in the United States. The industry estimates that approximately 80,000 new subscribers are being added per month.[6]

Although one might expect many citizens to be unaware of the potential of cable television, it is alarming to discover that public officials issuing licenses have been equally uninformed. Valuable licenses have been granted for practically no consideration, and underhanded practices to win licenses have been reported.[7] Commentators have criticized inadequate government regulation of CATV[8] and the concentration of ownership of cable television systems in a few corporations.[9]

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5 *See* Oppenheim, *The Coaxial Wiretap: Privacy and the Cable*, 2 YALE REV. L. & SOC. ACTION 282 (1972).

6 SLOAN REPORT, *supra* note 1, at 32.

7 The former chairman of Teleprompter Corporation, the largest cable company in the country, has been convicted of bribery in attempting to win a cable license in Johnstown, Pennsylvania. Wall Street Journal, Oct. 21, 1971, at 8, col. 2.

8 After examining the terms of local licenses granted for CATV systems, a Princeton study group concluded that the public interest had not been served and that "the performance of local government in regulating CATV can only be termed a failure." CENTER FOR THE ANALYSIS OF PUBLIC ISSUES, CROSSED WIRES: CABLE TELEVISION IN NEW JERSEY 65 (1971).

9 *See* SMITH, *supra* note 4. At present, approximately 34 percent of all cable tele-

Licensing decisions would be more informed and more responsible if municipalities were to select licensees on the basis of information supplied on standard application forms. The promulgation of an application form should be one critical step in a process of evaluating and determining the development of cable technology.[10] Only if a local licensing authority is aware of the relevant information elicited by these forms can it intelligently determine whom it wants to operate the desired system within its jurisdiction. Only if there is a public application form will individual citizens and interest groups be able to evaluate various applicants and formulate independent opinions about who can best satisfy their needs and concerns.

This Note suggests and describes a model application form which cities and towns might require applicants for a CATV license to complete. After explaining the rules of the Federal Communications Commission (FCC) and the Massachusetts statutory scheme which prompted this form, the Note describes the general philosophy behind the model and then sets forth the model with annotations.

I. Regulatory Background of Model Forms

A. *FCC rules*

The FCC's authority to regulate cable television derives from the Communications Act of 1934.[11] In the leading case, *United*

vision are served by the 10 largest multiple system operators. Smith, *Ownership Policy and the Cable Industry*, 4 Yale Rev. L. & Soc. Action 263 (1972).

10 Besides promulgating an application form, a licensing authority should consider implementing the following procedures: (a) establishing a local committee to study the community's needs for a CATV system, (b) publishing the committee's initial report, (c) holding public hearings on the report (preceded by proper notice of such hearings), (d) publishing the committee's final report including specifications for the desired CATV system, (e) publishing a notice for bids, (f) holding public hearings to consider the bids and the terms of a prospective license, and (g) deciding on the initial applications. Additionally, before a license is actually granted, the licensing authority might require a preferred applicant to resubmit his application form. The licensing authority could then require the preferred applicant to change his proposals to legally binding statements of intent. To avoid any confusion, the final license could provide that all statements of intent in the resubmitted application form shall be regarded as terms of the license unless the license specifically provides otherwise. The licensing authority might also delay asking certain questions until the resubmitted application form to reduce the amount of time and work for all parties in the initial application process.

11 47 U.S.C. § 151 *et seq.* (1970).

States v. Southwestern Cable Co.,[12] the Supreme Court sustained the FCC's jurisdiction to regulate CATV at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[13] In sustaining the FCC's authority to require CATV systems with 3500 or more subscribers to provide local origination cable casting, the Court in *United States v. Midwest Video Corp.*,[14] affirmed the reasoning of the *Southwestern* decision.

The extent of federal authority, however, is still far from clear. As state and local commissions also attempt to regulate CATV, there may be some battles for jurisdictional power among these levels of government. As long as there has been CATV, municipalities have had the power to license cable companies. Even before the new FCC rules took effect on March 31, 1972,[15] and in the absence of state regulation, a cable company still needed an authorization from a local municipality to install cables across public rights of way.

Although the new FCC rules do not eliminate the powers of the local licensing authority, the FCC is attempting to regulate the process by which a license is issued.[16] There is no question that the FCC has delegated to the states or local governments the authority to promulgate an application form. In requiring the issuing authority to attest to a licensee's qualifications and to provide due process in selecting a licensee, the FCC has encouraged the use of a local application form. The new FCC rules require the local issuing authority to consider certain qualifications of the applicant and to include certain terms in any license issued.[17]

12 392 U.S. 157 (1968).
13 *Id.* at 178.
14 406 U.S. 649 (1972).
15 47 C.F.R. § 76.1 *et seq.* (1972). The new provisions apply to all systems not in operation before March 31, 1972. "Grandfathered systems" that were operating before this date, however, need not comply with some of the new provisions until March 31, 1977, or until the end of their current license period, whichever occurs first. *Id.* § 76.11(b). The old FCC rules are at 47 C.F.R. §§ 74.1001-83, 74.1101-31 (1971). These did not require an issuing authority to evaluate certain qualifications of an applicant, nor did they require it to incorporate specific terms within the local license. Local licensees were not required to receive an FCC certificate of compliance before beginning operations, nor were they required to provide access services.
16 22 P & F RADIO REG. 2d 1755 (1971) (FCC Letter of Intent, Aug. 5, 1971).
17 47 C.F.R. § 76.31(a) (1972).

The local licensee, in turn, must apply to the FCC for a certificate of compliance before it can begin operations.[18] In order to obtain an FCC "certificate of compliance," a cable company must now have a license from a local issuing authority that assures that the "franchisee's [licensee's] legal, character, financial, technical and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising [licensing] authority as part of a full public proceeding affording due process . . . ."[19] The FCC can deny a certificate of compliance if it determines that the local licensing authority did not follow FCC rules in awarding a license or that the content of a local license does not meet FCC standards. Furthermore, by requiring a licensee to file for a certificate, the FCC has provided a procedure by which it too can solicit information from an applicant.[20]

The model forms are one way to fulfill the FCC requirement that the issuing authority must investigate and approve certain qualifications of the applicant. Furthermore the use of a standard application form can help the issuing authorities meet the FCC requirement that they select a licensee on the basis of a "full public proceeding affording due process."[21]

B. *The Massachusetts Statutory Scheme*

Recognizing the growing importance of cable television and the need to regulate its development in the public interest, the legislature of the Commonwealth of Massachusetts enacted a CATV statute in the fall of 1971.[22] The provisions of this Act deserve comment because the model application form was written to satisfy its particular requirements. Furthermore, since Massachusetts is one of only eight states[23] with any statewide system of cable

18 *Id.* § 76.11(a).

19 *Id.* § 76.31(a).

20 47 C.F.R. § 76.13 (1972) prescribes the information which must be included in a request for a certificate of compliance. In addition to requiring a local licensee to submit FCC Form 325 with an application for certification, the FCC requires the licensee each year to submit Form 325, Annual Report of Cable Television Systems, and Form 326, Cable Television Annual Financial Report. For comments on these FCC forms see the annotation to Part VI of the model form *infra.*

21 *Id.* § 76.31(a).

22 [1971] Mass. Acts & Resolves ch. 1103 (*adding* MASS. GEN. LAWS ANN. ch. 166A, §§ 1-21 (Supp. 1973)).

23 Seven states besides Massachusetts have passed laws specifically regulating

television regulation, and the only one with an operating statewide commission specifically regulating cable television alone,[24] the Massachusetts Act and the application form merit consideration as models for other states.[25]

Sworn in on June 21, 1972, the Massachusetts Commission has the power to affect the content of locally issued licenses[26] and the statutory duty to promulgate forms which must be completed by all applicants and licensees.[27] Although the power to issue licenses remains in the hands of the local "issuing authority,"[28] the Commission does possess a great deal of potential power to prescribe the terms of a license. Section 3 of the Act specifies terms which must be included in any license and provides that each license shall contain "such other terms and conditions as have been authorized by the Commission."[29] The Massachusetts Commission's discretion to prescribe terms of the license, however,

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cable television: CONN. GEN. STAT. ANN. §§ 16-330 to -333 (Supp. 1972); HAWAII REV. STAT. § 440G (Supp. 1971); NEV. REV. STAT. §§ 711.010 to .180 (1971); N.Y. EXEC. LAW §§ 811-31 (McKinney Supp. 1972); R.I. GEN. LAWS ANN. §§ 39-19-1 to -8 (Supp. 1971); VT. STAT. ANN. tit. 30, §§ 501-08 (Cum. Supp. 1972); Cable Television Act (Dec. 15, 1972) (to be codified at N.J. STAT. ANN. §§ 40:48-5A-1 *et. seq.*). In addition to these state laws directed specifically at CATV, at least one state agency has asserted the power to regulate cable television under a more general statute. The Illinois Commerce Commission has asserted its jurisdiction to regulate cable television under the existing Illnois Public Utilities Act. Investigation of Cable Television and Other Forms of Broadband Communications in the State of Illinois, 22 P. & F. RADIO REG. 2d 2192 (Ill. Commerce Comm'n 1971).

24 New York is the only state other than Massachusetts in which a separate state agency has jurisdiction to regulate CATV alone. The New York legislature has authorized the governor to appoint members to a state CATV agency, but the New York commission is not operating yet.

25 Connecticut and New York have yet to promulgate any forms, and those promulgated by Hawaii, Nevada, Rhode Island, and Vermont are completely inadequate to serve the purposes suggested in section II of this Note. For example, the Rhode Island form asks only seven questions, none of which require disclosure of specific information beyond simple identification of the applicant. R.I. GEN. LAWS ANN. §§ 39-19-1 to -8 (Supp. 1971) (the application form is on file at the Massachusetts Community Antenna Television Commission, State Office Bldg., 100 Cambridge St., Boston, Mass.).

26 MASS. GEN. LAWS ANN. ch. 166A, § 3 (Supp. 1973).

27 *Id.* § 4.

28 The "issuing authority" is defined in the Massachusetts statute to be a mayor, a city manager, or a board of selectmen. MASS. GEN. LAWS ANN. ch. 166A, § 1 (d) (Supp. 1973). Even if the mayor is the "issuing authority," the city council or board of selectmen still may be able to exert substantial influence on the licensing process. Before a licensee can operate any system, he will still need to receive a permit from the city council or board of selectmen to obtain the rights of way necessary to construct the system.

29 *Id.* § 3(e).

still is limited by specific provisions of the Act and by applicable FCC rules.[30]

For enumerated reasons, the Massachusetts Commission or the local issuing authority may revoke a license.[31] Additionally the Commission may upon its own initiative, upon the request of the Massachusetts Consumers' Council, or upon the petition of 10 percent of the registered voters of the area to be served by the licensee (or 10 percent of the subscribers who are taxpayers in the area to be served) investigate the granting, renewal, or assignment of a license or the manner in which business is being conducted, and, after a hearing, it may modify, suspend, revoke, or cancel such a license for cause.[32]

In addition to promulgating application forms for an initial license, the Massachusetts Commssion must also issue forms for transfer, assignment, or renewal of existing licenses.[33] Systems which already exist are also required to complete the application form when the Commission promulgates it.[34] The Commission must also issue forms for an annual statement of revenues and expenses, for a financial balance sheet, and for separate public and confidential ownership reports by each licensee.[35] Presumably, under its authority to hold hearings and "issue such standards and regulations as it deems appropriate to carry out the purpose of [the Act] . . .",[36] the Commission could promulgate any additional forms which might help it to perform its functions.

The Commission has wide discretion to choose questions for an application form since the Act requires that the application form contain "such information as the Commission may prescribe as to the citizenship and character of the applicant and the financial,

30 *E.g.*, 47 C.F.R. § 76.31(a) (1972).

31 *See* MASS. GEN. LAWS ANN. ch. 166A, § 11 (Supp. 1973).

32 The Commission alone has additional appellate power to review the actions of the issuing authority and additional original power to investigate the operation of a licensee. *Id.* § 14. Since the Commission may revoke for "cause" in addition to the reasons enumerated in § 11, it presumably has wider discretion than the issuing authority whose statutory power to revoke is only for the enumerated reasons.

33 *Id.* § 4.

34 [1971] Mass. Acts & Resolves ch. 1103, SECTION 6.

35 MASS. GEN. LAWS ANN. ch. 166A, § 8 (Supp. 1973).

36 *Id.* § 16.

technical and other qualifications of the applicant to operate the system . . . ."[37] Information is also specifically required about the owners, including all stockholders owning one percent or more of the issued outstanding stock and about planned services, safety measures, and installation and subscription fees. Most important, the forms may request "such other information as the Commission may deem appropriate or necessary."[38]

The Act also incorporates a sanction to deter applicants from making irresponsible promises in their application forms. The issuing authority or the Massachusetts Commission may revoke a license for "false or misleading statements in or material omission from any application . . . ."[39]

II. Goals and Philosophy Behind the Model Forms

The model application form is based on two general objectives: to solicit particular information from applicants and to solicit it in a particular form. These two objectives are of course related, since the justification for an inquiry should to some extent determine the form of the questions.

The first reason for soliciting particular information on the model form is to identify relevant policy issues in the development of cable television. Before an issuing authority can intelligently select a licensee, it should understand the criteria by which applicants should be judged. The questions themselves alert issuing authorities to these criteria. For example, since most licenses will be granted for 15 years,[40] questions are asked about the future potential of the proposed CATV system as well as the applicant's present plans.

A second reason for soliciting particular information is to

37 *Id.* § 4.

38 *Id.*

39 *Id.* § 11(a). In the process of bargaining for the final terms of the license, the applicant and the issuing authority could, of course, agree to incorporate terms and services which differ from the initial proposals submitted on the application form.

40 Fifteen years is the maximum that the FCC allows for an initial license. Licenses may be renewed for a "reasonable duration." 47 C.F.R. § 76.31(a)(3) (1972).

enable the issuing authority and the public to compare applicants. The disclosure of information in the answers to the forms should alter the licensing process by providing a reliable data base upon which to judge the qualifications of competing applicants. This information will also help issuing authorities to make more sophisticated and comprehensive demands and so allow them to negotiate better licenses with cable companies. Furthermore, if the basis for the licensing decision is limited to the information disclosed[41] and if the information is made public, covert dealings with favored applicants will be discouraged. Armed with identical information, an interested public should be able to challenge the justifications for the decision.

The form of the questions is also of crucial importance. An attempt was made to ask questions that require direct, easily understood answers. The purpose of the model application is to provide information in usable form, not to overwhelm issuing authorities or the public with mounds of incomprehensible paper or to burden applicants needlessly. An issuing authority should find it easier to compare concise answers presented in a standardized form than long, essay-type responses. At a minimum, the drafters tried to channel responses into specific categories or to solicit responses with reference to specific uniform terms.[42] Some areas however were not amenable to brief answers by reference to particular terms.[43]

Underlying both goals noted above has been a more general objective of neutrality. The form seeks to identify policy issues and to solicit information upon which decisions can be made, not to resolve "value questions" for the issuing authority. Employing this form would not wed an issuing authority to any particular conception of cable television or to any particular scheme of regulation. Only in the sense that the form prescribes the minimum information which should be available to evaluate an

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41 The issuing authority is required to hold a public hearing before a license is granted and "issue a public statement in writing containing the reasons for its acceptance or rejection of any or all applications, which reasons shall relate to the information the applicant furnished pursuant to [the application form]." MASS. GEN. LAWS ANN. ch. 166A, § 6 (Supp. 1973).

42 For example, see question 84 and comment *infra*.

43 For example, see questions 28 and 33 and comments *infra*.

applicant does it represent a value judgment by the drafters. The model form does not dictate whether a particular answer to a question should be considered favorably or unfavorably by the issuing authority or how much weight an issuing authority should attach to the response to any individual question. For example, questions 10 to 12 on the model form ask if the applicant or any party to the application has a license or a pending application to operate another CATV system. The questions themselves, however, do not indicate whether the issuing authority should favor or disfavor a multiple system operator, nor do the questions themselves indicate the importance which an issuing authority should attach to the answers. Even though the answers provided on the forms will not ultimately resolve any policy questions, they should encourage the issuing authority to formulate policy decisions.

The model form also attempts to be neutral regarding its effect on different types of applicants. Although the Cable Television Association of New England has advised that "the time and expense involved in completing this lengthy, detailed application will unfairly work in favor of the large multiple systems and against the small operator,"[44] we do not believe that this form places any discriminatory burden upon the small operators. As noted in the annotation to Section VI, the questions regarding the applicant's ownership structure and related interests may require lengthy answers. Small operators, however, should not have much paper work because their ownership structures will probably be uncomplicated, and they will probably not have any "related interests" to report. On the other hand, the cost of supplying the information required on the application form should be a relatively minor business expense for those applicants that have numerous corporate inter-connections.

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44 Memorandum from the Cable Television Association of New England to the Massachusetts Commission, Oct. 27, 1972, on file with the Massachusetts Commission. Since the date of this memorandum, a few questions have been deleted and others have been simplified, but the form has not changed substantially. Quoting the industry's comments to an earlier draft of the form, therefore, should not be equivalent to taking them out of context. Where appropriate, the suggestions of representatives of the industry will be noted in the annotations to individual questions.

MODEL CATV LICENSE APPLICATION[45]

DEFINITIONS AND INSTRUCTIONS

1. Questions to answer. All applicants should answer Sections I, IV, V, VI and VII. Applicants applying for recertification of an existing license should also answer Section II. Applicants applying for a transfer (transferee) or assignment (assignee) of an existing license should also answer Section III.

2. Party to the application. For purposes of questions 10-12, 76-80, and 83-84 "party to the application" includes: directors and officers of applicant's corporation, officers of an unincorporated association, partners, and any stockholders holding 10 percent or more of the applicant's outstanding stock.

COMMENT: Included in the definition of a "party" to the application are those persons about whom the licensing authority should have certain minimum information. As parties will exert varying degrees of control and influence over the applicants, it is important to determine their related or connected interests.

3. Interest. For purposes of questions 83, 84, and 87 "any interest in" or "connection with" means having:

a. ownership of 10 percent or more of any class of stock, or

b. ownership of 10 percent or more of any other ownership interest, or

c. ownership of 10 percent or more of any outstanding indebtedness, or

d. status as a director, officer, principal, or partner.

4. Type I Exhibit.

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45 The model application form is substantially the tenth draft of a form that was prepared by this writer and Roslyn G. Daum, a member of the class of 1974 at the Harvard Law School, as staff work under the guidance and direction of the Massachusetts CATV Commission. The Massachusetts Commission will promulgate an application form in the spring of 1973. The work of this writer and Ms. Daum with the Commission has been sponsored by Joseph Hill Associates, a non-profit consulting firm at the Harvard Law School staffed with law and business school students.

Public hearings were held in Boston and in Springfield to discuss this form and the development of CATV. The responses of the cable television industry and the public helped to refine some questions, but no major changes occurred as a result of these hearings.

FCC Form 301 suggested certain general areas of inquiry and the stylistic format. FCC Form 325, "Annual Report of Cable Television Systems," and FCC Form 326, "Cable Television Annual Financial Report," also suggested areas of substantive inquiry.

a. Where applicable, include:
(A) name;
(B) home address and legal residence, if different;
(C) date and place of birth;
(D) citizenship;
(E) nature of partnership interest or name of office held;
(F) the date office expires;
(G) principal profession or occupation;
(H) the name of employer;
(I) business address;
(J) the number of shares of each class of stock or number of membership or ownership interests;
(K) the percentage of ownership of partnership, or percentage of voting stock or membership;
(L) political offices held and participation in civic and charitable organizations in the state of this application in the past ten years.

b. Additional information may be provided.

c. Type I exhibits must be submitted for:
(A) applicant, if applicant is an individual;
(B) officers of applicant's corporation;
(C) partners of applicant's partnership including silent or limited partners;
(D) officers or principals of applicant's unincorporated association.

5. Type II Exhibit.

a. Where applicable, include:
(A) name;
(B) home address;
(C) citizenship;
(D) nature of partnership interest or name of office held;
(E) the year office expires;
(F) the number of shares of each class of stock or number of membership or ownership interests;
(G) the percentage of ownership of partnership or percentage of voting stock or membership.

b. Type II Exhibits must be submitted for:
(A) directors of applicant's corporation and directors of those corporations listed in questions 62, 66, and 71;
(B) officers of corporations or associations listed in questions 62, 66, and 71;

(C) one-percent shareholders of applicant's corporation and 10-percent shareholders of corporations listed in questions 62, 66, and 71;

(D) partners of any partnerships listed in questions 62, 66, and 71.

6. When Type I and Type II Exhibits are required. Applicants should be guided by the instructions and requirements denoted in the Type I and II Exhibits when answering questions 51, 56-59, 61, 63-65, 67-69, and 72-74.

QUESTIONS

I. IDENTIFICATION

1. State name and location of municipality and county for which cable television license is sought.
2. State applicant's full name and address.
3. State name and address of person to whom communications should be sent if different from item 2.
4. State business office address of applicant.
5. State name and title of applicant's chief executive officer.
6. File as Exhibit A a street map marked with the boundaries of the area to be served. Indicate the proposed location of tower or antenna.

COMMENT: It is important to know the specific boundaries of the proposed license area because an applicant may intend to serve only the affluent and densely populated areas within the licensing authority's jurisdiction in order to maximize his profits. Although the FCC has advised that "a plan that would bring cable only to the more affluent part of a city, ignoring the poorer areas, simply could not stand,"[46] applicants may still seek to exclude certain areas from the license.

Communities should also be aware that "electronic ghettoes" may be created if a license is awarded for only part of a municipality. To avoid this result, a licensing authority which grants separate licenses for separate sections of the municipality might require that each system have the present potential to be connected with others. This technical arrangement will be especially important if the issuing authority wants to assure that residents

46 37 Fed. Reg. 3276 (1972).

of all areas of the municipality can receive the same local origination programming.[47]

7. State the estimated overall costs of the proposed system.

COMMENT: In order to receive much more detailed financial information about the applicant and the proposed system, the issuing authority also should require applicants to file financial disclosure forms.[48] These forms should serve as a check on the applicant's reliability, as the issuing authority may determine whether or not the applicant's pro forma balance sheet will support the proposed system.

8. State general characteristics of the proposed system including:

a. the number of effective TV channels;
b. total MHz;
c. MHz per channel;
d. the estimated number of strand or street miles of cable;
e. the estimated percentage of aerial cables;
f. the estimated percentage of underground cables;
g. the average number of homes per mile of wire;
h. the estimated number of homes in area to be served;
i. the expected maximum number of subscribers at 100 percent penetration (system completion);
j. the anticipated number of subscribers at the end of each of the first six years after construction has begun.

COMMENT: It is especially important that the issuing authority evaluate an applicant's answers to parts (g), (h), (i), and (j) of this general information question to determine if the applicant's projections are based upon sound planning. If the issuing authority thinks that the applicant's expectations regarding the number of subscribers are unrealistic, he may question whether the applicant will be able to fulfill his promises.

9. If a license were granted and all other necessary authorizations were obtained, state:

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47 See comments to questions 34 and 38 *infra*.

48 The statute requires the Commission to include questions in the application form regarding an applicant's financial qualifications. MASS. GEN. LAWS ANN. ch. 166A, § 4 (Supp. 1973). To meet this requirement, the drafters of the model form also have written financial forms to be filed with the initial application.

a. the time period within which applicant proposes to begin full-scale construction;
b. the time period within which applicant proposes to complete construction;
c. the average rate (*i.e.*, mileage/month) at which applicant proposes construction will proceed;
d. as Exhibit B a street map of the area applicant proposes to serve indicating applicant's best estimate of the time in which construction will be completed and in which subscriber service will be available in different segments of the area to be served.

COMMENT: In the past, applicants have often failed to engage in any significant construction after receiving a license. These applicants have sought CATV licenses as an investment without any present intention to provide service. Today more than 40 percent of the approximately 4600 CATV licenses granted in the United States are for systems not yet in operation.[49]

To prevent licensees from continuing this practice, the FCC now requires that "significant construction" be completed within one year after receiving FCC certification.[50] Notwithstanding the new FCC rule, the applicants' intentions to complete construction may still vary, and so the issuing authority should scrutinize each applicant's timetable closely. Furthermore, in order to identify proposed delays in the wiring of poorer neighborhoods, the area in which construction will be completed in each time period should be indicated on a map.

10. If applicant or any party thereof is an applicant or licensee in any other municipality within the state of this application, supply as Exhibit C as of the date of this application for each such municipality information including:
a. the name of municipality;
b. the nature of interest of the applicant or licensee;
c. if licensee, the date license acquired;
d. if licensee, the date license expires;
e. the date of FCC certification, if any;
f. the percentage of construction completed;

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49 *See* Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685, 702 (1972).
50 47 C.F.R. § 76.31(a)(2) (1972).

g. the number of subscribers at 100 percent penetration;
h. a copy of the license.

11. If applicant or any party to this application operates systems outside the state of this application file as Exhibit D as of the date of this application for each system information including:
a. the name of the state in which such system operates;
b. the name of the municipality in which such system operates;
c. the name of licensee;
d. the date license acquired;
e. the date license expires;
f. the date of FCC certification, if any;
g. the percentage of construction completed;
h. the current number of subscribers;
i. the number of subscribers at 100 percent penetration.

12. If applicant or any party to this application has applications pending for a cable television license in any other state, then state:
a. the name of applicant;
b. the name of the state in which pending;
c. the name of the municipality in which pending.

COMMENT: Questions 10-12 were written to discover the applicant's history as a cable operator. The issuing authority should know whether or not the applicant is a multiple system operator and to what extent the applicant has actually constructed systems for which it holds licenses. Although the Cable Television Association of New England has advised the Massachusetts Commission that "information concerning operating systems outside the state is of little relevance,"[51] past performance may be indicative of the present intention and character of the applicant.

II. RECERTIFICATION

Applicants for recertification of an existing license must answer questions 13-14

13. File in Exhibit E a copy of any correspondence applicant has had with the FCC regarding this license since February 12, 1972. Also file as Exhibit E a copy of the application for certificate of compliance

51 Memorandum from the Cable Television Association of New England to the Massachusetts Commission, Nov. 13, 1972, on file with the Massachusetts Commission.

that has been filed or will be filed with the FCC to operate this license.

COMMENT: Applications for certification or renewal of an existing license should be subject to the same procedure as the original application. If the requirement that a license may only be granted for a maximum period of 15 years[52] is to have any significance in practice, the issuing authority must have information to assess license holders applying for a renewal and to compare these existing licensees with other applicants. FCC correspondence is requested because the issuing authority should be aware of any informal opinions about the new FCC rules which the FCC may have given an applicant.

14. File as Exhibit F copies of any annual report forms applicant has submitted to the FCC in regard to this license. (Information submitted as confidential to the FCC may be deleted.)

III. TRANSFER OR ASSIGNMENT

Applicants for transfer (transferee) or assignment (assignee) of an existing license must answer questions 15-23.

15. State full name and address of transferor or assignor.
16. State date license expires.
17. Describe the consideration to be given for the proposed transfer or assignment. File as Exhibit G copies of any and all agreements between transferor and transferee or between assignor and assignee.
18. File as Exhibit H a full statement of transferee's or assignee's reasons or purposes for requesting this license.
19. Identify by date and names of parties any contracts entered into by assignor which will be performed by assignee. If any changes will be made in contracts assumed by the assignee, describe these changes fully as Exhibit I.
20. File as Exhibit J a certified balance sheet of applicant as of a date within 90 days of the proposed transfer or assignment.
21. Describe how the transfer of control is to be effected. Note any:
a. change in classification of voting rights in stock;
b. issue of stock or sale of treasury stock;
c. reduction in the outstanding stock;
d. other actions (specify).

52 47 C.F.R. § 76.31(a)(3) (1972).

22. Describe any specific provisions applicant proposes to insure continuity of service to system subscribers during the transfer or assignment.
23. Describe what changes if any, applicant intends to make in any current plant, services, programming and/or rates after the proposed transfer or assignment. Describe these changes fully as Exhibit K.

COMMENT: Some cable companies, fearing the necessity of disclosure, may seek to obtain licenses through transfers or assignments. Questions 15-23 seek to prohibit this form of evasion by requiring potential transferees and assignees to answer these questions as well as sections I and IV-VIII.

IV. CABLE SERVICES AND PRICING

24. Concerning broadcast television stations which applicant proposes to carry, state:
   a. call letters;
   b. city of broadcast;
   c. state of broadcast;
   d. method of reception (o-off the air; cc-common carrier microwave; p-private microwave).
25. State the call letters and city and state of transmission of all standard or FM radio stations applicant proposes to carry. (If allband FM is carried, write "allband" instead of listing each station.)
26. Describe services applicant proposes to offer in addition to regularly rebroadcast or cablecast television signals. Note if applicant will provide radio, news ticker, time/weather scan, sports ticker, stock market ticker, burglar alarm, fire alarm, police surveillance, facsimile reproduction, preference polling, utility meter reading, and/or games and contests. In particular note:
   a. the type of service(s) to be provided;
   b. which services are included in monthly charge;
   c. the additional charge, if any, for each service;
   d. the hours of operation of each service;
   e. the number of cable channels used for each service.

Applicant may file as Exhibit L a more complete description of proposed services.

COMMENT: As competing applicants may offer a different range of services, it is important to determine the usefulness of each of

these services. Although CATV has been called the "television of abundance,"[53] the cable bandwidth presently is finite. Issuing authorities should know what portion of the bandwidth will be allocated to various services.

The Television Communications Corporation, one of the ten largest cable operators in the country, has objected to this question: "It would not be in the public interest for the issuing authority and the applicant to lock themselves, for the license period, into services (and related factors) which appear proper at the time of application and which are quickly outmoded."[54] TVC's fear is unfounded. Although applicants are required to give specific answers to question 26, the terms of the successful applicant's license need not bind it to provide only those services reported on the application form or agreed to during pre-licensing negotiations. The terms of a license might require an applicant initially, and for a specified time period and price, to offer certain services; however, a licensee could alter the services offered in order to keep up with the changing technology and adjust the charge to subscribers accordingly.

27. If applicant plans to offer non-automated local origination programming before the system has 3500 subscribers, file as Exhibit M a statement including:

a. the number of subscribers at which such programming will be provided;

b. the types of programming to be provided (*e.g.*, news, public affairs, sports) during a typical week;

c. the approximate number of hours per week for such programming;

d. how such programming will serve the specific needs of the area to be served;

e. how much of this programming the applicant expects will be produced within the area to be served.

COMMENT: FCC rules presently require that "no cable television system having 3500 or more subscribers shall carry the signal of any broadcast station unless the system also operates to

53 SLOAN REPORT, *supra* note 1.

54 Memorandum from the Television Communications Corporation to the Massachusetts Commission, Oct. 25, 1972, on file with the Massachusetts Commission.

a significant extent as a local outlet by origination cablecasting and has available facilities for local production and presentation of programs other than automated services."[55] Presently, automated services include a cable transmission of a time/weather scan or the UPI/AP tickertape; it is still unclear what other cable transmissions will be included within the definition of automated services.

These rules, however, do not prevent a licensee from agreeing to provide local origination in systems with less than 3500 subscribers. In addition to discovering at what number of subscribers an applicant proposes to offer local origination programming, a licensing authority should evaluate closely an applicant's answers to section d of question 27. These answers should give some indication of the type of channel that the applicant proposes to provide to meet the general FCC local origination requirement.

28. If applicant intends to provide a non-automated local origination channel, describe the policy for making time available for discussion of controversial issues of public importance.

29. State applicant's best estimate of the characteristics of the origination facilities for the designated public access channel(s), including:

a. the time of day that the facility will be available;

b. a description of facilities and equipment available including the cost of such equipment and facilities;

c. the technical assistance available;

d. whether origination facilities will be located within the area to be served;

e. the fees to access users for production costs and use of equipment in excess of five minutes.

COMMENT: According to new FCC rules, no cable television system operating in a community located wholly or in part within a major television market[56] may re-transmit a broadcast television signal unless the system meets the FCC's "access requirements."[57] Briefly, the access rules require each cable system to maintain

55 47 C.F.R. § 76.201(a) (1972).

56 A major television market is defined at 47 C.F.R. §§ 76.5(a) and 76.51 (1972). These market areas represent approximately the 100 geographic centers in the country with the greatest population.

57 *Id.* § 76.251.

at least one specially designated channel for the use of local educational authorities, one channel for the use of local government, and one channel for public access. In addition, there are provisions to increase the number of these channels to meet a proven need for more access programming, and there is a requirement that cable operators offer to lease any unused channels and unused portions of the designated access channels. The purpose of the public access channel is to make it possible for any member of the community to have access to this new communications network. To facilitate public access, the FCC requires that the first five minutes of public access use be free of any charge. Only production costs may be assessed for live studio presentations that exceed five minutes.[58]

The rules nevertheless do not insure that the public access channel will attract users or viewers. In order to compete for viewers with professionally produced, commercial programs, access users must meet the public's expectation of technical quality in television presentations. Question 29 elicits information about the applicant's plans for access studios, technical assistance, and fees, as the technical quality of access presentations will depend in part on assistance and equipment that a cable operator offers to access users.

Though the FCC has stated clearly that the local issuing authority may not prescribe the operating rules for the access channels, except the one for local government, question 29 is still valid.[59] Question 29 does not require the issuing authority to regulate the operation of any access channel, but merely permits it to discover which applicant's access plans would best serve the community's needs.

30. Specify the proposed:

a. basic installation charge;

b. installation charge for any additional hookups in the same house;

c. basic monthly charge to subscribers;

58 *Id.* § 76.251(a)(10)(ii).

59 The issuing authority cannot prescribe rules for public access and educational and leased channels, but the local licensee must still promulgate rules to govern these channels. These rules must be filed with the FCC and made available for public inspection. *Id.* § 76.251(a)(11).

d. monthly charge for each additional television hookup;
e. monthly charge for each specified service not included in basic monthly rate (see question 26);
f. special rate(s) for multiple dwelling units, including apartment houses, motels, hotels, office buildings, mobile homes parks, etc.

COMMENT: The Massachusetts Act directs the Commission to study the desirability of rate regulation for three years. After that time, the Commission may establish the rates individual cable systems may charge subscribers.[60] Until the Commission issues such a regulation, the Act provides that the maximum monthly charge to subscribers shall be seven dollars.[61] The FCC also has regulated the license fee which a state or local municipality may charge a licensee.[62]

31. Under what circumstances and at what distance from the trunkline does applicant propose there will be an additional charge for a subscriber hookup. If the charge will be based solely on distance, state the charge per yard. If other criteria are (also) to be considered in determining the charge, enumerate the criteria and the subscriber costs.

COMMENT: Question 31 attempts to discover what might otherwise be a hidden charge. Generally, cable operators and public utilities charge an additional installation fee if the subscriber is more than a specified distance from the company's main connecting lines. This additional charge is most likely to occur in rural or mountainous areas.

32. If applicant proposes to provide pay television, specify:
a. whether it will be produced by cable network, by program service, or by applicant;
b. whether charge(s) will be assessed per program, per channel, or on some other specified basis.

COMMENT: Pay television refers to subscriber charges for particular programs or channels in addition to the basic monthly charge.

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60 MASS. GEN. LAWS ANN. ch. 166A, § 15 (Supp. 1973).
61 [1971] Mass. Acts & Resolves ch. 1103, SECTION 2.
62 47 C.F.R. § 76.31(a)(6)(b) (1972).

33. Describe in detail applicant's proposed procedures for servicing subscriber complaints as Exhibit N.

COMMENT: The Massachusetts Commission is required to promulgate a more detailed complaint reporting form which licensees must file at least every three months with the Commission and the issuing authority.[63]

V. TECHNICAL

34. State if the proposed system can be described generally as:
- **a. a single trunkline;**
- **b. a double trunkline;**
- **c. a triple trunkline;**
- **d. a hub;**
- **e. a tree;**
- **f. a combination hub/tree.**

COMMENT: An explanation of the technical configuration of the system should indicate the capability to reach certain geographic areas or groups within the license area. Question 38 seeks information of this sort more directly.

35. Does applicant propose that this system will be a turnkey?

COMMENT: "Turnkey" is a word to describe an arrangement by which the licensee contracts with a third party to construct the CATV system.

36. File as Exhibit O a sketch of the proposed configuration of the system.

37. Indicate whether the proposed two-way capabilities of the system are:
- **a. digital (data);**
- **b. audio;**
- **c. visual.**

38. File as Exhibit P a description of the facilities applicant proposes to incorporate into the system to provide for the selective reaching of groups of subscribers.

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63 MASS. GEN. LAWS ANN. ch. 166A, § 10 (Supp. 1973).

COMMENT: An issuing authority should be aware of the applicant's plans to provide for the selective reaching of subscribers for the reasons stated in the annotation to question 6 *supra*. In addition to being able to reach selective geographic segments of a license area, a system could be made to reach individual subscribers selectively. For instance, technical medical programs could be sent to doctors and instructional programs could be offered to students. Others might receive major athletic events on a per program charge.

39. Specify what equipment, such as convertors or consoles, the applicant proposes to provide at the subscriber terminal and the charge for such equipment.

COMMENT: Depending upon the design of the system, convertors may be needed to provide more television channels and more complex services. This question is asked to identify what otherwise might be a hidden subscriber cost.

40. If applicant proposes to modify the home set in any other way, explain as Exhibit Q.
41. If applicant proposes performance standards higher than those required by current FCC rules, explain as Exhibit R.
42. As Exhibit S, describe in detail applicant's plans to insure compatibility with other cable systems.

COMMENT: See comment to question 6 *supra*.

43. State if applicant possesses a license or has an application pending for a license to operate a microwave relay system.
44. State if applicant intends to operate:
- **a. a laser link relay system;**
- **b. a satellite relay system;**
- **c. any other means of transmitting signals (specify).**

45. State if applicant intends to rent:
- **a. microwave relay facilities;**
- **b. a laser link relay system;**
- **c. satellite transmission facilities;**
- **d. other communication or transmission facilities (specify).**

46. State if applicant intends to rent:
- **a. microwave relays (channel hops);**
- **b. telephone transmission services;**

c. laser transmission services;
d. satellite transmission services;
e. other communication or transmission services (specify).

COMMENT: Question 43-46 are asked in recognition of the fact that relay systems will be needed to establish a national cable television "network." The issuing authority should know whether an applicant has other local licenses and purposes to operate or rent relay systems. These questions might be included in a resubmitted rather than in an original application form.[64]

VI. RESIDENCY, CHARACTER, AND OWNERSHIP OF APPLICANT

COMMENT: Parts A through F of section VI try to uncover the applicant's corporate and financial affiliations. An entity that purports to be locally owned may in fact be a subsidiary of a large corporation.

Questions 62-65 inquire about the "first generation" of corporations or other legal entities that have a substantial (10 percent or more) interest in the applicant. Questions 66-69, in turn, ask for the same information about the "second generation," *i.e.*, entities owning 10 percent or more of the "first generation" entities named. Question 70 then requests that the applicant continue such explanations until 10 percent of the last named legal entity is not, in turn, owned by another legal entity. Likewise, questions 71-75 propose an exhaustive investigation of the corporate holdings of the applicant himself.

At first blush, it may seem burdensome to inquire past the third "generation" of ownership and to inquire so extensively about the applicant's corporate holdings. It is precisely those cases, however, where there is unfolding ownership to report that the responses to these questions may reveal much about the true nature of the applicant. Furthermore, it should be emphasized that these extensive questions do not apply to small operators. If the applicant is really not connected to other legal entities, it will have very little paper work to do.

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64 See note 10 *supra*.

This series of questions on the model form differs significantly from FCC Form 325, Annual Report of Cable Television System. The FCC only requires the applicant to identify the first three generations of successive ownership, and only if successive ownership is 25 percent or more.[65] By continuing to incorporate and reincorporate, an applicant might be able to answer the FCC questions honestly and still conceal his ultimate ownership. The model form, however, inquires about 10-percent interests and does not stop at the third generation. The FCC also inquires about only the first and second generation of the applicant's corporate holdings, while the model form proposes a more exhaustive search.

In light of the different responsibility of the local issuing authority, a more penetrating local examination of the applicant should be seen as complementing, not conflicting with, the FCC scheme. The local authority is the initial licensor. It is appropriate, therefore, that the local application form request more information than the FCC annual report. Because the FCC requests from the local licensee who is applying for a certificate of compliance only a statement that the issuing authority has investigated its qualifications, it appears that the FCC has intended to place the primary responsibility upon the local licensing authority to consider the applicant's qualifications. The FCC requires merely that the licensing process and the content of the granted license meet certain requirements.[66]

A. *All applicants should answer questions 47-50 inclusive.*

47. Describe the nature of applicant including whether applicant is:
   a. an individual;
   b. a general partnership;
   c. a limited partnership;
   d. a corporation;
   e. an unincorporated association;
   f. any other legal entity (specify).

48. If applicant is not an individual, indicate the state, district, territory, or possession under the laws of which it is organized.

65 FCC Form 325, § 3 at 2.
66 *See* 47 C.F.R. § 76.31 (1972).

49. File as Exhibit T a copy of the articles of incorporation if applicant is a corporation or an incorporated association or a copy of the partnership agreement if applicant is a partnership.
50. State the name and address of applicant's attorney, accountant and chief engineer.

B. *If applicant is an individual, answer question 51.*

51. If applicant is an individual, file a Type I Exhibit.

C. *If applicant is a corporation, answer questions 52-58 inclusive.*

52. Describe how the stock of the corporation is marketed.

COMMENT: The purpose of this question is to discover whether the applicant's stock is sold on any exchange, over the counter, or through private transactions.

53. Attach as Exhibit U a copy of:
   a. the latest annual report to stockholders;
   b. the latest prospectus;
   c. the latest SEC Form 10-K;
   d. the latest SEC Form 10-Q.
54. For each class of stock of the applicant corporation indicate:
   a. the name and characteristics of the class;
   b. its par value;
   c. its vote per share;
   d. the number of shares authorized;
   e. the number of shares issued;
   f. the number of shares subscribed;
   g. the total number of stockholders of each class;
   h. the total number of stockholders of all the classes combined.
55. As Exhibit V, file a copy of any instrument of indebtedness. In addition, for all those who hold 10 percent or more of the outstanding indebtedness as of the date of this application state:
   a. the name of each creditor holding such indebtedness;
   b. the amount of credit in dollars held by such creditor;
   c. the percentage of total outstanding indebtedness held by such creditor;
   d. the terms of each debt agreement with such creditor;
   e. the form(s) of indebtedness with such creditor. (Specify whether it is bonds, loans, notes, mortgages, or any other form.)

COMMENT: The request for copies of any instruments of in-

debtedness might be delayed until the application form is resubmitted. See note 10 *supra.*

56. File a Type I Exhibit for all officers of the applicant corporation.
57. File a Type II Exhibit for all directors of the applicant corporation.
58. File a Type II Exhibit for all principal and beneficial stockholders owning one percent or more of each class of the outstanding shares of stock.

D. *If applicant is an unincorporated association, answer questions 59 and 60.*

59. File a Type I Exhibit for all officers, principals, and ultimate beneficial owners, however designated.
60. Indicate the legal organization of the applicant, and cite the laws under which it is organized.

E. *If applicant is a partnership, answer question 61.*

61. File a Type I Exhibit for all partners.

F. *If applicant is a corporation, unincorporated association, or partnership, answer questions 62-75 inclusive.*

62. If 10 percent or more of the stock of the applicant is owned by any other corporation(s), individual(s), or legal entity(ies), or any legal entity has a 10 percent ownership interest in the applicant, then indicate:
   a. the name of legal entity;
   b. the percentage of stock or ownership interest owned by such entity.
63. File a Type II Exhibit for all directors of the legal entities or partners of a partnership named in question 62.
64. File a Type II Exhibit for all officers of the legal entities named in question 62.
65. File a Type II exhibit for all principal and beneficial stockholders owning 10 percent or more of each class of the outstanding shares of stock of the corporation named in question 62.
66. If 10 percent of the stock of the legal entity named in the answer to question 62 is in turn owned by another legal entity or if any other legal entity has a 10 percent ownership interest in the entity named in question 62, then indicate the:
   a. name of the legal entity exerting such control;

b. percentage of stock or ownership interest owned by such entity.

67. File a Type II Exhibit for all directors of the legal entities or partners of a partnership named in question 66.
68. File a Type II Exhibit for all officers of the legal entity named in question 66.
69. File a Type II Exhibit for all principal and beneficial stockholders owning 10 percent or more of each class of the outstanding shares of stock of any corporation named in question 66.
70. If 10 percent or more of the stock of the legal entity named in the answer to question 66 is in turn owned by another legal entity or if 10 percent or more of the stock of the legal entity named in this question is in turn owned by another legal entity, then until there are no more 10 percent stockholders of the last named legal entity continue listing:

a. the name of the legal entity having such ownership;
b. the percentage of stock or ownership interest owned by such entity.

71. If the applicant owns 10 percent or more of the stock of any other corporation or has a 10 percent ownership interest in any other legal entity, then indicate:

a. the name of such corporation or legal entity;
b. the primary nature of the business of such entity;
c. whether such entity is public or private;
d. what percentage of stock or ownership interest of such entity is owned by applicant.

72. File a Type II Exhibit for all directors of the legal entities or partners of a partnership named in question 71.
73. File a Type II Exhibit for all officers of the legal entity named in question 71.
74. File a Type II Exhibit for all principal and beneficial stockholders owning 10 percent or more of each class of stock of the outstanding shares of stocks of any corporation named in question 71.
75. If the legal entity(ies) named in answer to question 71 in turn owns 10 percent or more of the stock of another legal entity, or has a 10 percent or more ownership interest in another legal entity, then continue listing the same information requested in question 71 until the last named legal entity has no 10 percent ownership in another legal entity.

G. ***All applicants must answer questions 76-89 inclusive. File as Exhibit W any explanations accompanying the answers to questions 76-82 inclusive.***

76. State if applicant or any party to this application has had any public license, franchise, or permit revoked or suspended by order or decree of any court or administrative agency.
77. State if the Securities Exchange Commission has instituted any legal action against the applicant.
78. State if the applicant or any party to this application has been found guilty by a federal court of a violation of the laws of the United States relating to unlawful restraints, monopolies, combinations, or agreements in restraint of trade.
79. State if the applicant or any party to this application has been found civilly or criminally liable by any court or any agency of: any felony; any charge of libel, slander, obscenity, or invasion of privacy; the violation of any state, territorial, or local law relating to unlawful lotteries, restraints, monopolies, or combinations, contracts or agreements in restraint of trade; using unfair methods of competition.
80. State if there is now pending in any court or administrative body against the applicant or any party to this application any action involving any of the matters referred to in questions 76-79.
81. State if involuntary proceedings in bankruptcy have ever been brought against the applicant.
82. State if there are any outstanding unsatisfied judgments or decrees against the applicant.
83. State if the applicant or any party to this application has now or has had in the past five years any interest in or connection with any of the following enterprises:

a. television broadcast station(s) or applicant(s) whose grade B contour includes the proposed license area;
b. newspaper media and their affiliates whose major circulation areas include the proposed license area;
c. television or radio sales or repair service(s).

If the answer to "a", "b", and/or "c" above is affirmative, then for each such affirmative answer also state:

d. the name of the applicant or party;
e. the name of the enterprise;
f. the location of the enterprise;

g. the type of interest held by the applicant or party (see Definitions and Instructions, *supra* at number 3);

i. the percentage of stock, ownership interest, or indebtedness held by the applicant or party.

84. State if the applicant or any party to this application has now or has had in the past five years any interest in or connection with the following enterprises:

a. broadcast station(s) or application(s) for such stations, or other news media and their affiliates, such as magazines, not included in question 83;

b. telephone company(ies);

c. the manufacture or distribution of any data transmission equipment or services;

d. the manufacture or distribution of any cable, cable amplifiers, or other distribution equipment;

e. the manufacture of computers;

f. computer time sharing company(ies);

g. the manufacture or distribution of any origination equipment and/or studio gear for any cable system;

h. agency(ies), ownership, or distribution of motion picture films or rights thereto;

i. the development, production, distribution, or selling of video and/or audio program material;

j. microwave network(s) or microwave relay system(s);

k. other communications common carrier(s) not already listed in question 84.

If the answer to any of "a" through "k" above is affirmative, then for each such affirmative answer also state:

l. the name of the applicant or party;

m. the name of the enterprise;

n. the location of the enterprise;

o. the type of interest held by the applicant or party (see Definitions and Instructions, *supra* at number 3);

p. the percentage of stock, ownership interest or indebtedness held by the applicant or party.

85. State if applicant or any party to this application has:

a. any application pending before the FCC for common carrier, community antenna relay, or broadcast constructor permits or licenses within the state of this application;

b. any application for the above which has been denied by the FCC.

86. If 10 percent or more of the gross income of the applicant or any party to the application is derived from any enterprises listed in questions 83-84, then state:

a. the name of such applicant or party;
b. the name of the enterprise from which such income is derived;
c. the percentage of such income;
d. the amount of such income.

COMMENT: Both the FCC rules and the Massachusetts Act specifically limit the cross-ownership patterns of CATV systems, but neither limits the number of systems one cable operator may own.[67] According to the FCC rules effective January 1, 1973, no cable television system can carry the signal of any television broadcast station if the system directly or indirectly owns, operates, controls, or has an interest in: (a) one of the three nationwide television networks; (b) a broadcast television station that serves a whole or part of the area designated in the CATV license; or (c) a television translator station licensed to serve the community of the CATV system.[68] The Massachusetts Act also provides that licensees may not be "newspaper media and their affiliates in their major circulation areas"[69] and that licensees "shall not engage directly or indirectly in the business of selling or repairing television or radio sets."[70]

Although a CATV system is not prevented from owning other enterprises, the FCC considers it relevant to inquire about other interests of the applicant/licensee or parties. The FCC inquires about ownership interests of the applicant or parties to the application in broadcast stations, other CATV systems, manufacturers of CATV equipment, other common carriers, or daily newspapers.[71] But the scope of the FCC inquiry is inadequate for an initial application for a CATV license. Since CATV may perform many services besides the transmission of television signals, an inquiry

67 *See* R. L. SMITH, A WIRED NATION (1972). Smith strongly urges that there be a limit to the number of subscribers which one corporation and its affiliates can serve. The purpose of this limitation would be to prevent the formation of new media monopolies which could possess more power than the three nationwide networks now have.

68 47 C.F.R. § 76.501 (1972).

69 MASS. GEN. LAWS ANN. ch. 166A, § 1(e) (Supp. 1973).

70 *Id.* § 5(d).

71 FCC Form 325, § 3, question 7.

about additional interests of the applicant and parties is relevant to the licensing process. Furthermore, it is important to inquire about interests that do not appear directly related at the time the application is filed, for these interests may become more relevant by the end of the licensing period. The issuing authority should know what other established communications interests, broadly defined, the applicant and parties represent, for the applicant's answers to questions 83-86 may indicate the manner in which the applicant plans to develop the system.

Replying to an earlier draft of this form, Television Communications Corporation, one of the 10 largest cable companies in the country, criticized question 84: "We cannot see how most of the matters in this item are at all relevant to an applicant's qualifications to own and operate a CATV system."[72] Notwithstanding this criticism, the drafters believe that a conglomerate applicant should indicate the nature of its interests in other media and computer related enterprises.

87. State and explain as Exhibit X if any parties to this application are related to each other as mother, mother-in-law, father, father-in-law, husband, wife, brother, brother-in-law, sister, sister-in-law, son, or daughter, and if any person so related to any party to this application has any interest in any enterprises or applications listed in question 83-84.

COMMENT: This question attempts to discover concentrations of ownership interests in the applicant which might not be identified otherwise. Individuals named as parties to the application might at first glance appear to have only a small interest in the applicant. The identification of the parties' family ties, however, may reveal that one person or family controls the applicant.

VII. OTHER CHARACTERISTICS OF THE PROPOSED SYSTEM

88. Attach as Exhibit Y an explanation of safety measures for the proposed system.

89. State the procedures, including the use of a monitor, applicant

72 Memorandum from the Television Communications Corporation to the Massachusetts Commission, Oct. 25, 1972, on file with the Massachusetts Commission.

proposes to use when installing a cable hookup to insure that the subscriber terminal is working properly.

COMMENT: Frequently when subscribers are not satisfied with their television picture after the cable has been attached, the fault is with the home television set and not the cable installation. To limit future problems and misunderstandings, it would be helpful to identify the source of any flaws in reception at the time of installation.

90. State how much insurance applicant proposes to carry on the cable system described in this application.

91. State what procedures applicant proposes, if any, to insure that the subscriber is informed of any information obtained from the use of his television set. In particular note if applicant plans to obtain prior consent of each subscriber before undertaking or consenting to allow others to collect from individual subscriber's televisions surveys, polls, or other information.

COMMENT: Issuing authorities and the public should be aware that it is technologically possible for the licensee or a person with the licensee's permission to monitor a subscriber's use of his television set. Before the issuing authority can effectively protect subscribers' privacy, it must know what potential incursions the applicant will allow.

The Cable Television Association of New England, responding to an earlier draft of this form, suggested that "procedures to insure subscriber privacy and prevent unauthorized use of information should not be left to the discretion of the applicant. It is a responsibility of the Government to respond to the public's expression about such matters and devise the necessary procedures."[73] Certainly the government should take affirmative action to protect the subscriber's right of privacy. The purpose of this question, however, is to solicit information to which the public can react. Only then can the government respond to the public's expression.

92. Submit as Exhibit Z the applicant's equal employment opportunity program for the station, indicating specific practices to be

73 Memorandum from the Cable Television Association of New England to the Massachusetts Commission, Nov. 13, 1972, on file with the Massachusetts Commission.

followed in order to assure equal employment opportunity for minority groups and women in each aspect of employment practices including: recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff, and termination.

93. If subscribers and/or non-subscribers of the area to be served will be able to participate in the ownership and/or operation of the cable system, describe as Exhibit AA procedures for implementing such participation.

COMMENT: In the first draft of the application form, this question read, "Explain the methods the applicant will use to ascertain the programming and communication needs and interests of the area to be served." The question was amended to inquire about the subscribers' power to control the operations of the system. An applicant could easily have answered the original version of this question with proclamations about its intent to consult its subscribers. The question as it now reads enables the issuing authority to rank applicants in terms of the amount of substantive decision making delegated to subscribers.

94. Attach as Exhibit BB a copy of any contract(s) or proposed contract(s) or plan(s) with utility companies for pole attachments or other facilities including signal carriage in either direction. If there is no contract or proposed contract at this time, submit applicant's best estimate as to rates that will be charged by these utilities.

COMMENT: This information is important as state public utility departments may decide to regulate the fees which utility companies charge CATV systems to lease cable space on their poles. This question might be included only in the resubmitted application form. See note 10 *supra.*

95. If applicant wishes to state any additional information to support its request for a license, file such a statement as Exhibit CC.

*William Eisen**

*Member of the class of 1974 at the Harvard Law School.

BOOK REVIEWS

LEGISLATIVE HISTORY: RESEARCH FOR THE INTERPRETATION OF LAWS. By *Gwendolyn B. Folsom.* Charlottesville: University Press of Virginia, 1972. Pp. 136, index. $6.00, paperback $2.95.

*Reviewed by Morris L. Cohen**

The study of legislative history has become in recent years one of the most active areas of legal research, not only among lawyers but also among scholars and professionals of other disciplines. For the legal profession this interest arises in part from the increasing importance of legislative and administrative sources in litigation generally. The expansion of statutory regulation of all aspects of human conduct has similarly made the legislative process and the documentary sources of legislative intent an important concern of economists, historians, and political and social scientists. Specialists involved in any activity which is the subject of such statutory control are increasingly drawn into legislative study.

Research in legislative sources may have a variety of objectives, such as determining the current status of pending legislation; understanding the social, economic, or political context surrounding the legislature's consideration of a particular problem or measure; or determining (and perhaps proving) the legislative intent underlying a specific law. This last purpose has become a common focus of litigation because of the frequent ambiguities in American legislation — ambiguities arising either from the fallibility of language or from compromises inherent in the political bargaining of our legislative process.

The growth of judicial involvement in the determination of legislative intent can be seen in this comment by Justice Felix Frankfurter:

> As the area of regulation steadily widened, the impact of the legislative process upon the judicial brought into being, and compelled consideration of, all that convincingly illumines an enactment, instead of merely that which is called, with de-

*Librarian and Professor of Law, Harvard Law School. B.A. 1947, University of Chicago; LL.B. 1951, Columbia Law School; M.L.S. 1959, Pratt Institute.

> lusive simplicity, "the end result" . . . . Legislative reports were increasingly drawn upon, statements by those in charge of legislation, reports of investigating committees, recommendations of agencies entrusted with the enforcement of laws, etc. etc. When Mr. Justice Holmes came to the Court, the U.S. Reports were practically barren of references to legislative materials. These swarm in current volumes. And let me say in passing that the importance that such materials play in Supreme Court litigation carry far-reaching implications for bench and bar.[1]

Deliberate attempts by congressmen to manufacture legislative history that will cause courts to interpret legislation in a certain fashion have been a questionable by-product of this process.[2] Although it is certainly fortunate that we have progressed from the early restrictive view of American courts[3] and the still current English limitations on the use of documentary evidences of legislative intent,[4] many observers feel that our courts might be somewhat more selective and confine their inquiry to hard evidence, except in unusual cases. Charles P. Curtis stated this position in very strong terms, as follows:

> The courts used to be fastidious as to where they looked for the legislative intention. They used to confine the inquiry to the reports by committees [of the legislature] and statements by the member in charge of the Bill. But now the pressure of the orthodox doctrine has sent them fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention.[5]

Justice Robert Jackson expressed similar misgivings,[6] based in

1 Frankfurter, *Some Reflections on the Reading of Statutes*, 2 RECORD OF N.Y.C.B.A. 213, 233 (1947), reprinted in 47 COLUM. L. REV. 527, 542-43 (1947).

2 *See, e.g.*, Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A.J. 1314 (1959); Nutting, *The Planned Colloquy — What Now?*, 46 A.B.A.J. 93 (1960).

3 Chief Justice Taney summarized this approach in Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845), and reaffirmed in United States v. Union Pacific R.R., 91 U.S. 72, 79 (1875), and in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 316-19 (1897).

4 *See* Magor & St. Mellons R.D.C. v. Newport Corp., [1952] A.C. 189; THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, THE INTERPRETATION OF STATUTES 31-37 (1969).

5 Curtis, *A Better Theory of Legal Interpretation*, 4 RECORD OF N.Y.C.B.A. 321, 327-28 (1949).

6 Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 533 (1948).

part on his concern that the average lawyer would not have access to the legislative documents necessary to formulate such arguments.

Primary reliance should be given to the reports of the congressional committees to whom the proposed legislation was referred and by whom it was studied and frequently revised. Hearings, executive messages, and administrative agency memoranda are generally of lesser value, except perhaps to describe the legal and factual background of the enactment and the problem which it was designed to remedy. Comparisons of the text as enacted with its preliminary forms and amendments and with related bills may be useful, but certainly should not be considered as decisive evidence of legislative intent. Debates, even when involving the legislator who introduced the bill or the member charged with managing it on the floor, have been considerably debased and can no longer be relied upon in the absence of other evidence. Perhaps the problem should not focus on which type of material can be admitted as evidence of legislative intent, but rather on the relative weight to be given to each type of evidence.

As a result of the growing interest in legislation, the bibliographic apparatus of legislative history, originally rather cumbersome, has seen considerable improvement in recent years. While legal publishing generally became quite sophisticated by the end of the 19th century, legislative materials were slower to attract the interest of commercial publishers. By virtue of their inherent bulk and their relative neglect by practitioners, legislative documents were usually published only in official editions and had few research aids. However, during the New Deal period, several new finding tools were issued which made research in legislative history easier, quicker, and more effective.[7] Since World War II, several more have been added.[8]

Statutory interpretation itself has been the subject of many

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7 For example, *The Digest of Public General Bills* in 1936; *CCH Congressional Index* in 1937; *U.S. Code Congressional & Administrative News* in 1942, under the title *United States Code Congressional Service.*

8 For example, *Congressional Quarterly* in 1945; *The Daily Digest* of the *Congressional Record* in 1947; *Congressional Monitor* in 1964; *Congressional Information Service* in 1970.

treatises from the 16th century[9] down to our own times.[10] We have also had useful manuals of legislative procedure[11] and a wealth of periodical articles on the problem of determining legislative intent.[12] Gwendolyn Folsom's study of research in legislative history, however, is the first book devoted solely to this subject, and it offers the most complete treatment available. It is a welcome addition to the rich literature of American legal bibliography and may, if widely used, raise the quality of research in legislative history and perhaps stimulate further improvement in the published sources and tools available for that research.

The book deals primarily with federal legislative materials, although there are occasional references to state sources. After a helpful background discussion of research in legislative history and of the legislative process itself, the text deals with the basic sources of information, the available finding tools, additional sources on taxation legislation, materials for constitutional research, and finally, treaty interpretation. The author describes her work as "intended primarily as an introduction for beginners, normally law students . . ." (p. vii). However, it should be useful for anyone seriously undertaking legislative research. Many lawyers are woefully ignorant of the methods and materials of legal bibliography, a craft failure particularly striking with respect to research in legislative history. This weakness is compounded by a widespread failure to appreciate the potential value of legislative sources in advocacy and in related functions of the legal profession. One can predict that, because of its publication by a

9 *See* A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES (S. Thorne ed. 1942).

10 *E.g.*, E. CRAWFORD, THE CONSTRUCTION OF STATUTES . . . (1940); J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (3d ed. 1943).

11 *E.g.*, A. COIGNE, STATUTE MAKING . . . (2d ed. 1966); F. RIDDICK, ENACTMENT OF A LAW (1967); C. ZINN, HOW OUR LAWS ARE MADE (Fischer rev. ed. 1971).

12 See notes 1, 2, 4, and 6 *supra. See also* Finley, *Crystal Gazing: The Problem of Legislative History*, 45 A.B.A.J. 1281 (1959); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Nutting, *The Supreme Court and Extrinsic Aids to Statutory Interpretation*, 43 A.B.A.J. 266 (1957); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Stringham, *Crystal Gazing: Legislative History in Action*, 47 A.B.A.J. 466 (1961); Wasby, *Legislative Materials as an Aid to Statutory Construction: A Caveat*, 12 J. PUB. L. 262 (1963); Note, *A Re-evaluation of the Use of Legislative History in the Federal Courts*, 52 COLUM. L. REV. 125 (1952); Note, *A Decade of Legislative History in the Supreme Court: 1950-1959*, 46 VA. L. REV. 1408 (1960).

scholarly press, this guide is unfortunately not likely to reach those who need it most. If, however, it were extensively used in the law schools — either through legal bibliography courses, where they exist, or in offerings on legislation — the book might have a constructive influence on the next generation of the bar.

The most broadly useful sections of the book will undoubtedly be Part III, "The Acceptable Sources of Information" (pp. 30-41), and Part IV, "Finding Guide to Relevant Federal Materials" (pp. 42-76). In Part III, the author offers an excellent summary of judicial limitations on the various types of material which can be used to prove legislative intent. She also describes the relative weight given to each in the courts, with citations to the leading cases in point. In Part IV, each type of legislative material is described as to form of publication, general characteristics, and applicable research aids and techniques. The major finding tools and status tables, which are essential throughout legislative research, are described. Although quite adequate as a general introduction, most bibliographic detail has been omitted, and recourse is necessary to standard guides.[13] Similarly, the simplified descriptions of slip laws, the Statutes at Large, and the United States Code must be supplemented by more detailed treatment.[14] Part IV also contains useful references to collected legislative histories which have been published on specific acts and to microform editions of legislative documents. Two publications useful for legislative research which are not mentioned by the author are *Congressional Monitor* and *National Journal.*

Parts V ("Additional Sources for Tax Laws" at pp. 77-88), VI ("Sources for Constitutional Provisions" at pp. 89-107), and VII ("Usable Background for Treaty Interpretation" at pp. 108-32) are particularly valuable for specialists in those areas. Although there are occasional omissions of useful sources, particularly in VII,[15] these sections do offer descriptive summaries of research materials and methods which are not available elsewhere.

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13 *See, e.g.*, L. SCHMECKEBIER & R. EASTIN, GOVERNMENT PUBLICATIONS AND THEIR USE (2d ed. 1969).

14 *See* E. POLLACK, FUNDAMENTALS OF LEGAL RESEARCH (3d ed. 1967); M. PRICE & H. BITNER, EFFECTIVE LEGAL RESEARCH (3d ed. 1969).

15 Although M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (1963-) is noted, its still useful predecessors — Wharton (1887), Moore (1906), and Hackworth (1940-

The arrangement is functional, and the book itself is handy and attractive, although reproduced from typescript. One is reluctant to carp at minor defects when faced with a work which is generally so well done and so badly needed. The index, however, an essential aid in such a manual, does not include many of the publications described in the text. The inclusion of exhibits (particularly of finding tools and indexes), while perhaps difficult considering the method of book production, would have made it much more effective for teaching purposes and permitted some evaluation of alternative sources and services. Although the footnotes are rich in possibilities for further study, a bibliography of related material would also have been quite helpful.

Research in legislative history on the state level is far more difficult than in the federal area. The states offer a paucity of official sources and virtually no finding tools. Ms. Folsom recognizes this problem and makes some general references to state materials in her text. The present work focuses primarily on federal research, and that emphasis is certainly understandable in light of the amount of federal material to be covered. In view of her valuable contribution here, however, one can only hope that she will undertake a similar work on the details of state legislative research — an area virtually without guides.[16] That bibliographic morass, worse even than the chaos of administrative law in the early New Deal period, impedes effective scholarship and hampers the proper administration of justice.

A modern legal system cannot function properly without ade-

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44) — are overlooked. Other omissions are S. BEMIS & G. GRIFFIN, GUIDE TO THE DIPLOMATIC HISTORY OF THE U.S., 1775-1921 (1935); the bibliographically valuable first volume of D. MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (1931); the new and definitive historical collection of U.S. treaties: C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 (1968); and the essential current finding tool for treaties, TREATIES IN FORCE (annual, 1950-). The bound series, *Public Papers of the Presidents of the United States* (annual, 1958-) is also omitted from several relevant places, although the companion *Weekly Compilation of Presidential Documents* is cited.

16 Exceptions to this neglect are the following excellent studies of legislative research for New York and California: D. HENKE, CALIFORNIA LEGAL RESEARCH HANDBOOK ch. 3 (1971); Breuer, *Legislative Intent and Extrinsic Aids to Statutory Interpretation in New York*, 51 L. LIBRARY J. 2 (1958); Dana, *Background Materials for Statutory Interpretation in New York*, 14 RECORD OF N.Y.C.B.A. 80 (1959); White, *Sources of Legislative Intent in California*, 3 PACIFIC L. J. 63 (1972).

quate access to all of its relevant legal records, including sources dealing with legislative history in its broadest sense. The task of assuring such access merits the attention and commitment of all who are functionaries of, or subject to, that system. Ms. Folsom's monograph recognizes that need and makes a valuable contribution to legal research and scholarship. It deserves the widest circulation and use.

THE PAYROLL TAX FOR SOCIAL SECURITY. By *John A. Brittain*,[1] Washington: Brookings Institution, 1972. Pp. 285. $8.95 (hardcover); $3.50 (paperback).

Introduction

John A. Brittain's analysis of the financing of Social Security has added a good deal of analytical material to the current debate on aid to the aged.[2] There is little doubt that this Brookings Institution study ranks as a major contribution to the literature on social security. As a work intended to have a policy impact, however, Brittain's book fares somewhat worse.

Several mathematical passages may deter many readers from reading beyond the first chapter. Skipping the mathematical portions altogether, however, will not limit one's understanding of Brittain's analysis. Since much of the highly technical material is either peripheral to the main line of argument or already available to most readers capable of deciphering the analysis,[3] greater use of technical appendices for such material would have helped Brittain attract a wider audience.

Before analyzing the content of Brittain's effort, it is useful to

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1 Senior Fellow in the Brookings Institution Economic Studies Program. Hereinafter citations to the book will be by page number.

2 *See, e.g.*, W. COHEN & M. FRIEDMAN, SOCIAL SECURITY: UNIVERSAL OR SELECTIVE? (1972); Bok, *Emerging Issues in Social Legislation: Social Security*, 80 HARV. L. REV. 717 (1967); Hollander, *Reform in Social Security*, N.Y. Times, Jan. 3, 1973, at 37, col. 6.

3 Brittain, *The Incidence of Social Security Payroll Taxes*, 61 AM. ECON. REV. 110 (1971). For the ensuing debate on this article, see Feldstein, *The Incidence of the Social Security Payroll Tax: Comment*, 62 AM. ECON. REV. 735 (1972), and Brittain, *The Incidence of the Social Security Payroll Tax: Reply*, 62 AM. ECON. REV. 739 (1972).

have an over-view of the main features of the social security payroll tax. Payment of the payroll tax is involuntary,[4] and there are no exemptions on the basis of family size and the like.[5] The share contributed by the employees is matched by an employer tax contribution.[6] An individual's social security payments and those made by his employer on his behalf do not go into a personal fund to earn interest until his retirement. Instead, amounts equal to current contributions are appropriated out of money in the Treasury to fill the trust fund from which the benefits of those now receiving social security are paid.[7] An individual's earning level establishes his future eligibility for social security benefits and the size of his benefits. The actual benefit levels to be received are contingent upon congressional modification of social security provisions and the level of contributions of future workers.

I. Brittain's Theory of Payroll Tax Incidence

Brittain's discussion does not focus on the benefit aspects of social security, but rather upon the incidence of the initial payroll tax contributions. The main question he analyzes is whether the employer portion of the payroll tax is shifted to workers as a whole.[8] The employer's tax could be shifted forward thereby passing it on to consumers through higher prices. Alternatively, there could be a backward shifting of the tax in which case workers' wages would be reduced by the amount of the employer tax. Combinations of forward and backward shifting are also possible.

In analyzing the incidence question, Brittain criticizes the popular view that the employer tax is not shifted at all and that the only portion borne by labor is their payroll deduction.[9] While the popular view accords with what happens in terms of actual

4 Int. Rev. Code of 1954, §§ 3101-26. The related tax on self-employment income is likewise mandatory. Int. Rev. Code of 1954, §§ 1401-03.

5 *See* Int. Rev. Code of 1954, §§ 3101, 3111, 3121, 1401-02.

6 Int. Rev. Code of 1954, §§ 3101, 3111.

7 42 U.S.C.A. §§ 401, 1395*i* (1970). Employment taxes are paid into the Treasury as internal revenue collections. Int. Rev. Code of 1954, § 3501.

8 P. 21.

9 P. 24.

funds paid to the government, Brittain recognizes that this is a naive approach to the question. In particular, it ignores possible shifting of the tax that ultimately forces labor to bear a far greater share of the tax than their payroll deductions indicate.

In setting up his alternative to popular misconceptions, Brittain uses a variant of the competitive economic model to determine the incidence of the tax.[10] In essence, this model assumes that nobody possesses market power to influence wages or prices. Suppose that prices of goods are fixed and a social security tax is imposed on employers. If they continue to pay the same wages to labor as before and also bear the cost of the social security tax, their wage bill will rise, increasing costs. But under the competitive model the firm's profits were zero before the tax. Thus, the increased wage bill will create a net loss, driving the firm out of business. Only if the wages are reduced by the amount of the tax can firms avoid a loss. If wages are reduced by more than the amount of the tax, all of the workers will leave to work elsewhere. Thus, the wage decline equals the value of the employer tax under the competitive model.

Similarly, if wages are fixed and prices vary, the firm cannot continue charging its former price after the employer tax, since its previously zero level of profits would drop to a net loss equal to the value of its social security taxes. It must raise its prices sufficiently to cover the cost of the tax and return to its zero level of profits. It cannot charge a price greater than that amount, since its competitors would undersell it.

Under Brittain's variant of this model, the entire value of the employer portion of the tax is shifted to "labor," either through higher prices or lower wages.[11] Brittain uses the term "labor" to refer to all income earners, including management and the self-employed. He assumes that the payroll tax affects only two broadly inclusive economic groups: firms in terms of their profits, or labor in terms of wages and prices. In fact, some income earners who do not participate in the social security program do not

10 Pp. 32-49. The following discussion is intended to provide a simplified summary of the competitive model and is by no means intended to be theoretically rigorous.

11 P. 36.

fit within Brittain's term "labor." Yet these income earners bear some of the cost of social security taxes which are shifted into higher prices. Nevertheless, since the percentage of people who do not expect to benefit from social security is small,[12] Brittain's concept of "labor" is not unreasonable.

However, Brittain's conclusion that labor bears the entire burden of the payroll tax, including the employer's tax, is overstated, since it hinges upon a simplified view of how wages and prices are set. A variety of market imperfections interfere with the attainment of the competitive result. Most important is that both labor and firms possess considerable control over wages. Recognition of the role of bargaining power and collective bargaining in our society leads to different economic consequences than those cited by Brittain.[13] The imposition of the social security tax upon employers should enhance the value of the bargaining package received by employees, since the value of the employer tax is imposed by the government and does not require that employees sacrifice negotiating demands to receive these benefits. Therefore, in the bargaining context the employer tax for social security confers a net advantage upon the workers.[14]

The ability and willingness of a firm to pass on the tax in terms of higher prices also depends on a variety of complex factors. The degree of concentration in the industry, the nature of consumer demand, and the role of the government in controlling prices all affect the tax's impact on prices. Any of these factors may force a firm to absorb the tax in lower profits, a real economic possibility that Brittain dismisses by using the competitive model which assumes there are no profits. In spite of these qualifications to Brittain's argument, his basic conclusion that employers do not bear the burden of all of their social security taxes is sound.

Unfortunately, little can be done to solve the basic problem posed by Brittain's theory of the payroll tax incidence. Legislative modifications cannot transform the sharing of the employer-

12 *See* J. PECHMAN, H. AARON, & M. TAUSSIG, SOCIAL SECURITY: PERSPECTIVES FOR REFORM 263 (1968).

13 The classic treatise of the role of power relations in determining wages is that of J. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS (1958).

14 Dunlop discusses the effect of social security in altering compensation rules for workers. *Id.* at 121-28.

employee tax burden back to the equal shares dictated by Congress. A major statistical problem exists in determining the proportions in which various enterprises shift the taxes forward through higher prices or backward through lower wages. Without such information, any altering of the tax will result in continued inequitable burdens. Labor in firms in which taxes are shifted backward through lower wages are hit both ways. Their own wages decline due to their firm's backward shifting, while the shifting of the employer's tax through prices by other firms reduces the purchasing power of labor's earnings. Labor in industries in which the taxes are passed on through higher prices only suffer the effect of the price rises without the wage decline. Inability to determine each firm's relative amounts of the two kinds of shifting prevents the employer tax percentages from being adjusted to accommodate such differences. Yet another major technical problem exists. Suppose that an enterprise shifts 90 percent of its employer tax to labor. Labor's effective total tax share is thus 95 percent. Even if the employee's tax were abolished and the employer's tax were doubled, labor still would bear 90 percent of all social security taxes. In short, legislating an equalization of effective employer and employee taxes is not an economically viable policy alternative.

II. The Incidence Data

In testing his hypothesis, Brittain employs statistical tests utilizing foreign data as well as tests relying on U.S. figures.[15] His main objective is to determine whether it is plausible to assume that none of the employer tax is borne by labor. As might be expected, the results lead to rejection of this view. Brittain thus accepts the polar hypothesis — that all of the employer tax is shifted to labor.[16]

What Brittain does not tell the reader is that there is a wide range of alternative hypotheses consistent with his results. For example, the view that half or three-fourths of the employer tax is shifted to labor is also consistent with the data. The importance

15 Pp. 60-81. The foreign tests involve cross-sectional regressions, while tests on U.S. data are time series regressions.

16 P. 73.

of Brittain's contribution is in providing evidence dispelling any illusion that the employer really bears all of his tax. In short, some significant shifting of the tax to labor occurs. Unfortunately, the results cannot distinguish whether the burden is shifted via wages or prices.

We should also keep in mind the weakness of the evidence Brittain presents. While the international data imply relatively strong support for significant shifting of the employer tax, the omission of a number of relevant factors from the analysis tends to bias his results.[17] Brittain's neglect of differences in cultures and in the economic structure of various countries leads us to conclude that the degree of shifting found by Brittain in the international results may well be overstated.

While Brittain's study of the United States experience was not hindered by such complicated differences, his results were somewhat "erratic."[18] Unfortunately, Brittain's failure to include the figures he calculated prevents others from analyzing the type of statistical problems he encountered and the meaningfulness of his results.

III. Brittain's Policy Conclusions

On the basis of the preceding results, Brittain argues for increased funding of social security through the income tax to lessen the burden of the payroll tax on those less able to bear the burden of taxation.[19] In justifying the need for this policy reform, Brittain presents a wealth of data indicating that the social security tax is a greater burden on low and middle income groups than is the income tax.[20] For example, a family of four with one

17 The procedure used by Brittain involves regressing manufacturing wages on value added in production per unit of labor and on differing values of social security taxes (including the shifting of employer taxes). His equations "explain" 92 to 96 percent of the wage variation. P. 69. The omission of variables capturing international cultural factors, societal mores, power relations, and the like indicate that Brittain's favorable results may be attributable to specification error. In particular, the high estimates of the shift coefficients are probably due to the omitted variable bias created by the neglect of the aforementioned influences. For an excellent treatment of problems created by omitted variables, see H. Theil, Principles of Econometrics 549-52 (1971).

18 P. 77.

19 Pp. 117, 149, 256.

20 Pp. 82-114.

earner pays a higher social security tax than income tax for all wage and salary levels below $15,000.[21] This calculation assumes that both the employer's and employee's social security taxes are borne by labor. Even under a less restrictive assumption of 50 to 75 percent of the employer tax being shifted, Brittain's conclusion is not invalidated.

It should be noted, however, that Brittain's policy recommendation is based on the ethical assumption that taxation should be based on one's ability to pay.[22] Brittain should have examined other policy choices that stem from the equally or more compelling assumption that individuals ought to pay for the benefits they receive. Those using this alternative assumption recognize the necessity of making adjustments for society's altruism; but unlike Brittain, they maintain that benefits should be considered in determining the optimal tax structure.

Yet Brittain contends that the tax and benefit aspects of social security should be considered separately.[23] He argues that the two parts are divisible since expected benefits generally exceed an individual's tax contributions[24] and since social security is not directly analogous to private insurance.[25] But both of these arguments are irrelevant. Even though expected benefits exceed contributions, social security remains a coherent system since it is financially self-contained. The taxes paid by those now working and their employers pay current social security benefits. While declining population, decreased per capita wages, or substantial increases in the elderly population may jeopardize the self-financing mechanism, historically payroll taxes have funded benefits. Though the contributors and beneficiaries at any point in time are generally different groups, a link between taxes and benefits exists. Moreover, the level of benefits received depends on the

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21 P. 91.

22 P. 3.

23 P. 115.

24 Pp. 151-79. It is not clear from Brittain's discussion that he has incorporated the lower life expectancies of the poor into his analysis. If he has not, then the desirability of social security benefits for lower income groups would be lower than the figures indicate since many lower income contributors do not live long enough to reap many social security benefits.

25 P. 9. The case cited by Brittain is Flemming v. Nestor, 363 U.S. 603, 610 (1960).

level of past earnings,[26] which generally affect one's tax contributions.[27]

Because Brittain focuses only on social security taxes, his rationale for alleviating the social security burden on the poor by general revenue financing centers on the equity issue of who pays.[28] In fact, much more is at stake. Replacement of the payroll tax could create psychological, economic, and political problems for the elderly. First, general revenue financing would risk upsetting the sense of dignity that beneficiaries now possess.[29] Use of income taxes to fund other income maintenance efforts has stigmatized the beneficiaries, both through the presence of a means test and the fact that benefits are in no way earned by the recipients.[30] Similar stigmatization could affect our entire elderly population if we abandon the current financing mechanism for social security. Second, replacement of a payroll tax with general funding might subject social security benefit levels to frequent and uncertain congressional decisions. Any subsequent instability in funding levels and/or consumer doubts about funding might result in significant economic harm by forcing the elderly to divert their funds to cover possible needs. Instability in funding might also make the elderly more anxious about whether they will receive enough social security to cover their needs. Finally, the political feasibility and desirability of subsidizing the poor through general revenue financing is questionable. If such assistance were provided, the resulting benefit levels might be lowered and might thus reduce the net benefits of social security for the poor. In view of current political emphasis on the work ethic and on reducing welfare rolls, a shift to general revenue financing might lower social security's subsidy to the poor.

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26 42 U.S.C.A. §§ 413-15 (1972).

27 INT. REV. CODE OF 1954, § 3101 (1970). *Cf.* INT. REV. CODE OF 1954, § 1401.

28 P. 256.

29 As noted by Senator George, Chairman of the Senate Finance Committee when the Social Security Amendments of 1956 were passed: "Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect." 102 CONG. REC. 15110 (1956).

30 J. BROWN, AN AMERICAN PHILOSOPHY OF SOCIAL SECURITY: EVOLUTION AND ISSUES 87 (1972).

In determining an ideal long-run solution to the social security tax burden, we should not follow Brittain's policy recommendation. Introduction of cash transfers to the poor, such as a negative income tax with substantial work incentives and benefits for the working poor, would be preferable to Brittain's proposal. The working poor would be aided without disturbing the beneficial aspects of social security.

IV. Conclusion

The fundamental drawback with Brittain's book is that he fails to consider the social security program's net effects. Instead, he maintains that the impact of the payroll tax can be considered wholly apart from the incidence of benefits. The limitations of Brittain's policy recommendation stem from his isolation of the payroll tax from other aspects of the social security program. While the case for social security reform is strong, it does not require the type of solutions urged by Brittain. It is likely that reducing the risks of being poor in old age ranks as a more fundamental problem than the structure of payroll taxes. Even if one wishes to focus on easing the payroll tax burden, solutions other than those proposed by Brittain are more effective in alleviating the inequities and can also avoid stigmatizing social security benefits.

On balance, however, Brittain raises important issues with an unusual degree of rigor. The main implications of Brittain's effort do not involve his policy recommendations. Even though appropriate modification of his results is necessary, Brittain makes a notable contribution in proving that much of the employer portion of the payroll tax is shifted to labor. Although a policy may be designed to provide for a clearcut allocation of benefits and costs, Brittain's conclusion should remind legislators and students of public policy that actual economic implications need not follow the pattern intended by legislation, even if the legislative provisions are followed.

*W. Kip Viscusi**

* Doctoral candidate in economics, Harvard University.